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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 435

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., PETITIONERS,

vs.

WATERMAN STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1945
CERTIORARI GRANTED NOVEMBER 5, 1945

SUPREME COURT OF THE UNITED STATES

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In the United States Court of Appeals, District of Columbia

No. 8862

WATERMAN STEAMSHIP CORPORATION, APPELLANT

v.

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN, UNITED STATES MARITIME COMMISSION, ET. AL., APPELLEES

Appeal From the District Court of the United States for the District of Columbia.

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 In the District Court of the United States for the District of Columbia

Civil Action No 24840

WATERMAN STEAMSHIP CORPORATION, MERCHANTS NATIONAL BANK BUILDING, MOBILE, ALABAMA, PLAINTIFF

v.

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN, UNITED STATES MARITIME COMMISSION, COMMERCE BUILDING, WASHINGTON, D. C.

THOMAS M. WOODWARD, INDIVIDUALLY AND AS CHAIRMAN OF THE PRICE ADJUSTMENT BOARD OF THE MARITIME COMMISSION, COMMERCE BUILDING, WASHINGTON, D. C.,

A. G. RYDSTROM, INDIVIDUALLY AND AS A MEMBER OF THE PRICE ADJUSTMENT BOARD OF THE MARITIME COMMISSION, ELECTRICAL WORKERS BUILDING, 15TH AND M STREETS, N. W., WASHINGTON, D. C.

JOHN R. PAULL, INDIVIDUALLY AND AS A MEMBER OF THE PRICE ADJUSTMENT BOARD OF THE MARITIME COMMISSION, ELECTRICAL WORKERS BUILDING, 15TH AND M STREETS, N. W., WASHINGTON, D. C., AND

CARMAN G. BLOUGH, INDIVIDUALLY AND AS A MEMBER OF THE PRICE ADJUSTMENT BOARD OF THE MARITIME COMMISSION, RAILROAD RETIREMENT BUILDING, WASHINGTON, D. C., DEFENDANTS

Complaint for injunction and for a declaratory judgment

(Filed June 27, 1944)

Plaintiff respectfully alleges and shows to this Court as follows:

3 (1) Plaintiff, Waterman Steamship Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Alabama, having its principal office and place of business in the City of Mobile, in the State of Alabama.

(2) Defendant Emory S. Land is the Chairman of the United States Maritime Commission (hereinafter referred to as the "Commission") and as such is the official authorized and directed by the Act of Congress hereinafter referred to, to require the renegotiation of the contract price, and to eliminate excessive profits on contracts entered into with the Commission. He is sued herein as defendant individually and in his official capacity as such Chairman.

(3) Defendant Thomas M. Woodward is the Chairman of the Price Adjustment Board of the Maritime Commission, a Board created by and functioning as a part of the Commission. He is sued herein as defendant individually and in his official capacity as such Chairman of the Price Adjustment Board of the Maritime Commission.

(4) Defendants A. G. Rydstrom, John R. Paull, and Carman G. Blough are members of the Price Adjustment Board of the Commission. They are sued herein as defendants individually and in their official capacity as members of such Board.

(5) The Price Adjustment Board of the Commission (hereafter referred to as the "Board") was created by the Commission by its Administrative Order No. 64, dated May 5, 1942, for the purposes of carrying out the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law No. 528, 77th Congress) approved April 28, 1942, as amended, (hereinafter referred to as the "Renegotiation Act") insofar as it relates to renegotiation of contracts and subcontracts entered into with the Commission. Said Administrative Order provides in substance and among other things that the Board shall

possess the function and be charged with the respon-
4 sibility of bringing about such review of contract and subcontract prices as it may deem desirable, renegotiating or causing to be renegotiated such contract prices when in its judgment such action is necessary or desirable, and making such recommendations to the Commission as may be appropriate to effectuate the results of such renegotiations. A copy of said Administrative Order is attached hereto and marked "Exhibit A." and made a part hereof as though fully set forth herein.

(6) There exists an actual and immediate controversy between the parties hereto, and the plaintiff brings this action for the purpose of enjoining the enforcement by the defendants and

operation of the aforesaid Renegotiation Act against the plaintiff for the reason that said Renegotiation Act is not applicable to the contracts hereinafter more particularly described, and for a declaratory judgment declaring that said contracts are not subject to the provisions of the Renegotiation Act as aforesaid. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

(7) Plaintiff employs and for many years prior to 1941 has employed the accrual method of bookkeeping, and keeps its accounts and makes its federal income and excess profits tax returns on the basis of a fiscal year ending September 30.

(8) Plaintiff was at all times hereinafter mentioned and prior thereto engaged in the business of owning steamships and until all its vessels were requisitioned by the War Shipping Administration, was engaged in the operation of said vessels in general trades. Its vessels were purchased and have at all times since the enactment of the Merchant Marine Act, 1936, been operated by it wholly without governmental financial aid in any form.

(9) The plaintiff as owner of the steamships hereinafter mentioned and on the dates specified, entered into charter agreements with the British Ministry of War Transport, an agency of the British Government, an alien within the meaning of the Shipping Act, as amended, chartering the space of said vessels at the rates and under the terms and conditions provided in said charter agreements, a copy of one of said charter agreements being attached hereto and made a part hereof as though fully set forth herein, and marked "Exhibit B," the terms and conditions of all of said charter agreements on the following vessels being identical to said "Exhibit B":

Vessel	Date of charter agreement
Antinous	April 25, 1941
Iberville	April 25, 1941
Bienville	April 25, 1941
Jean Lafitte	April 25, 1941
Andrew Jackson	May 24, 1941
West Kyska	May 26, 1941
Ipswich	July 10, 1941

(10) The plaintiff as owner of the steamships hereinafter mentioned and on the dates specified, entered into charter agreements with the British Ministry of War Transport, an agency of the British Government, an alien within the meaning of the Shipping Act, 1916, as amended, chartering the space of said vessels at the rates and under the terms and conditions provided in said charter agreements, a copy of one of said charter agreements being attached hereto and made a part hereof as though fully set forth herein, and marked "Exhibit C," the terms and conditions

of all of said charter agreements on the following vessels being identical to said Exhibit C:

Vessel:	Date of charter agreement
Beauregard	August 16, 1941.
Lafayette	August 16, 1941.
Gateway City	September 24, 1941.
Lasalle	September 24, 1941.

6 (11) The plaintiff, as agents for the Pan Atlantic Steamship Corporation, the owner of the Steamship "Pan Kraft," on the 25th day of April 1941, entered into a charter agreement with the British Ministry of War Transport, an agency of the British Government, an alien within the meaning of the Shipping Act, 1916, as amended, chartering the space of the said S. S. "Pan Kraft" at the rates and under the terms and conditions provided in said charter agreement, a copy of which is attached hereto and made a part hereof as though fully set forth herein and is marked "Exhibit D."

(12) The said charter agreements entered into between the plaintiff and the British Ministry of War Transport as aforesaid were approved by the United States Maritime Commission pursuant to the provisions of Section 9 and Section 37 of the Shipping Act, 1916, as amended (46 U. S. C. Section 808 and Section 835), which makes unlawful, without the approval of the Commission, the chartering of any vessel owned by a citizen of the United States to any person not a citizen of the United States, said approval being upon the conditions set forth in the Commission's Resolution with respect thereto, of May 29, 1941.

(13) The plaintiff is informed and believes and therefore avers that the United States or a department or agency thereof entered into an arrangement, agreement, or contract with the British Government or an agency thereof with respect to payments required to be made to the plaintiff by the British Ministry of War Transport, under the form of charter agreements entered into by the plaintiff with the British Ministry of War Transport. The details of said arrangement, agreement, or contract are unknown to plaintiff, except as the same are set forth in a letter from the Office for Emergency Management, an agency of the United States, to the British Merchant Shipping Mission, dated the 9th day of June 1941, a copy of which letter is attached hereto and made a part of this complaint as though fully set forth herein, and
7 marked "Exhibit E." The plaintiff was not a party to, nor was it consulted with respect to the arrangement, agreement, or contract aforesaid, and took no part in the discussions or negotiations which led to its consummation.

(14) The plaintiff prior to the enactment on April 28, 1942 of the said Renegotiation Act, received final payment of the charter hire on each of said vessels on the dates hereinafter set forth, and completed its obligations to the charterer under the terms of said charter agreements, and said charters were terminated on the respective dates following:

Vessel	Date of payment of charter hire	Termination or completion date of charter agreement
Antinous	July 2, 1941	July 23, 1941
Bayville	July 14, 1941	August 19, 1941
Bienville	July 2, 1941	August 8, 1941
Jean Lafitte	August 2, 1941	September 4, 1941
Andrew Jackson	September 13, 1941	October 20, 1941
West Kyska	August 2, 1941	October, 5 1941
Ipswich	September 27, 1941	November 9, 1941
Beauregard	November 5, 1941	December 27, 1941
Lafayette	October 30, 1941	December 12, 1941
Gateway City	November 28, 1941	January 1, 1942
Lasalle	November 26, 1941	January 26, 1942
Pan Kraft	August 2, 1941	August 22, 1941

(15) On November 26, 1943, the defendants, purporting to act under the authority of the said Renegotiation Act, and under the Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission issued pursuant to the provisions of the Renegotiation Act, served notice on the plaintiff in the form of a letter, that on December 13, 1943, they would commence the renegotiation of the aforesaid charter agreements and demanded that the plaintiff forward to them certain statements, information and financial data specified therein. A copy of said letter and Joint Statement are attached hereto and marked
8 "Exhibits F and G," respectively, and made a part hereof as though fully set forth herein.

(16) On December 13, 1943, the plaintiff by letter delivered on that date, advised the defendants in part as follows: that plaintiff would not furnish the information requested in the aforesaid letter of the defendants and would not agree to the renegotiation of said charter agreements, for the reasons that said agreements were not entered into with any "Department" as defined in said Renegotiation Act, but were agreements entered into directly and solely with the British Ministry of War Transport, an agency of the British Government, an alien within the meaning of the Shipping Act, 1916, as amended; that said Renegotiation Act provides that no contract made with a "Department" as defined in the Act shall be subject to renegotiation where final payment pursuant to such contract was made prior to April 28, 1942, and that since the said charter agreements had been completed and final payments of the charter hire, pursuant to said charter agree-

ments, were made prior to April 28, 1942, said charter agreements were not subject to the provisions of the Renegotiation Act; that the said Renegotiation Act provides that no renegotiation of any contract shall be commenced more than one year after the close of the fiscal year of the contractor within which completion or termination of the contract, as determined by the Secretary of the Department, occurs, and that more than one year after the close of the fiscal year of the plaintiff, within which said charter agreements were completed and terminated, had expired prior to such purported commencement of renegotiation. A copy of said letter is marked "Exhibit H," attached hereto and made a part hereof, as though fully set forth herein.

(17) By letter dated May 23, 1944, the defendants replied and advised the plaintiff that with respect to the Red Sea operation, it had been determined there was in each case a con-
9 tract between the vessel owner, the plaintiff, and the Maritime Commission to which the Renegotiation Act is applicable, and demanded that the plaintiff submit to the defendants certain statements, information, and financial data in accordance with the proposed outline for such information and financial data attached to said letter, and requiring the plaintiff to appear at a conference with the Commission's Price Adjustment Board on June 29, 1944, for the purpose of determining what portion of the profits of the plaintiff under the aforesaid charter agreements is excessive within the meaning of the Renegotiation Act. A copy of said letter and attachments are marked "Exhibit I" attached hereto and made a part hereof as though set forth fully herein.

(18) The plaintiff avers that the assumption of authority and jurisdiction by the defendants purportedly under the provisions of said Renegotiation Act to require the plaintiff to submit statements, information and data with respect to, and to renegotiate said charter agreements is arbitrary and capricious and without warrant in law for the reasons that said Renegotiation Act is wholly inapplicable to the said agreements between the plaintiff and the British Ministry of War Transport because said agency of the British Government is not a "Department," as defined in said Renegotiation Act but is an alien within the meaning of the Shipping Act, 1916, as aforesaid; that even though said agency of the British Government could be shown to be a "Department" within the meaning of the Renegotiation Act, said Act provides that no contract shall be subject to renegotiation where final payment pursuant thereto was made prior to April 28, 1942; that no renegotiation of any contract subject to said Renegotiation Act shall be commenced more than one year after the close of the fiscal

year of the contractor within which completion or termination of the contract, as determined by the Secretary of the Department, occurs; that final payment of the charter hire under each of said charter agreements aforesaid was made prior
10 to April 28, 1942; that within the meaning of the Renegotiation Act and the Joint Statement aforesaid, the plaintiff's obligations under the aforesaid charter agreements were completed and said charter agreements were terminated within the fiscal years of the plaintiff which ended September 30, 1941 and September 30, 1942, respectively; that any arrangement, agreement or contract between the United States or any department or agency thereof, and the British Government or any agency thereof with respect to payments required to be made to the plaintiff by the British Ministry of War Transport under the terms of the charter agreements aforesaid is not subject to the provisions of the Renegotiation Act, which specifically provides that any contract by a Department with any foreign government or agency thereof shall not be subject to renegotiation.

(19) Notwithstanding the provisions of said Renegotiation Act and the fact that said charter agreements were not entered into by the plaintiff with any "Department," as defined in said act, the defendants, purporting to act in their official capacities aforesaid, and purportedly under the provisions of said Renegotiation Act intend to and will, unless the relief prayed herein is granted, unlawfully require the plaintiff to furnish said defendants with the statements, information, and financial data specified in their letters dated November 26, 1943, and May 23, 1944, copies of which are attached to this petition as Exhibits "F" and "I," respectively, and unlawfully require the renegotiation of said charter agreements, or unlawfully make a unilateral determination of alleged excess profits under the charter agreements aforesaid, and refix the contract price or charter hire thereunder, and unlawfully withhold amounts due the plaintiff from the United States, thereby depriving the plaintiff of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. Plaintiff under said act
11 must either furnish the statements, information and financial data demanded by the defendants and submit to renegotiation which is final and conclusive, or the defendants will make a unilateral determination which cannot be appealed (except for the purpose of seeking a redetermination of the amount so determined), or to be subjected to civil suits against it for the recovery of any amounts the defendants may so unlawfully determine as alleged excessive profits, or be subjected to criminal prosecution for failure to submit the statements, in-

formation and data demanded by defendants, and a possible penalty or a fine and imprisonment against it or its officers and employees.

(20) Plaintiff avers that the defendants are without any power or authority in law to require the plaintiff to submit the statements, information, and financial data demanded by them, or to require the renegotiation of said charter agreements, or to make a unilateral determination of alleged excessive profits with respect to the aforesaid charter agreements, or to refix the contract price or charter hire under the charter agreements aforesaid, and said threatened action on their part is without warrant of law, capricious and arbitrary, and beyond the scope of their authority under the said Renegotiation Act.

If the plaintiff should furnish to the defendants the statements, information, and data demanded by them as aforesaid, and comply with the requirement of the defendants to commence renegotiation of the charter agreements aforesaid, the plaintiff would be in danger of being estopped, and counsel for the plaintiff has advised it that a court might hold that it would be estopped to deny the authority of the defendants under the said Renegotiation Act to require renegotiation of the aforesaid charter agreements, or to make a unilateral determination of alleged excessive profits and refix the contract price or charter hire under said charter agreements, or to secure a judicial determination of the applicability of the provisions of the Renegotiation Act to the charter agreements aforesaid, or the invalidity of the acts of the defend-

12 ants purportedly thereunder. Moreover, the penalties provided in the Renegotiation Act for noncompliance with the demands of the defendants to submit the statements, information, and data as aforesaid, and for failure to commence renegotiation of and to renegotiate the said charter agreements, as required by the defendants would impose upon the plaintiff the burden of obtaining a judicial decision of the validity of the demands of the defendants heretofore shown, only upon the condition that if unsuccessful, the plaintiff must pay excessive penalties and have moneys due the plaintiff from the United States withheld for the payment of such sums as the defendants may determine to be excessive profits under said charter agreements, and be subjected to civil suits for the recovery of such sums. Such penalties are so severe as in effect to close all approaches to the Courts, and deprive the plaintiff of any adequate remedy at law in the premises.

(21) Unless injunctions as prayed herein be granted, which shall in substance restrain and enjoin the defendants individually and in their official capacities as aforesaid, from requiring the

plaintiff to submit the aforesaid statements, information, and financial data demanded by the defendants, and from commencing renegotiation and renegotiating said charter agreements, or refixing the contract price or charter hire thereunder, and which shall restrain and enjoin said defendants individually and in their respective official capacities from giving effect to and enforcing the provisions of the Renegotiation Act with respect to the aforesaid charter agreements, the plaintiff will suffer immediate and irreparable injury, that is to say: the plaintiff will be subjected to a possible fine and imprisonment against it or its officers and employees, under the penal provisions of the Renegotiation Act and to the expenditure of large sums of money in defense of criminal prosecutions against it for alleged violation of the requirement that it furnish the statements, information, and data demanded by the defendants with respect to the aforesaid
13 charter agreements; and by the defendants arbitrarily, and without any power or authority in law, making a unilateral determination under the purported authority of said Renegotiation Act that the plaintiff is indebted to the United States for large sums of money the amounts of which are unknown to the plaintiff, as alleged excessive profits, and will withhold or cause to be withheld from amounts due the plaintiff from the United States such sums so unlawfully determined, thereby depriving the plaintiff of its property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States, or will institute civil action against the plaintiff to recover the sums so unlawfully determined, and thus involve the plaintiff in a multiplicity of suits either as plaintiff or defendant, thereby causing great expense and loss of money and time to the plaintiff, all of which said injuries and damages would be incapable of admeasurement and adjudication in an action at law.

(22) Plaintiff avers that there does not exist any plain, speedy, adequate, or complete remedy at law for the protection of its lawful rights and property and the prevention of the irreparable injury and irrecoverable damages thereto, except in a suit of this nature and by the injunctive and other processes and judgments of this court.

Wherefore, the plaintiff prays:

(1) That this Court issue immediately its temporary restraining order against the defendants and each of them individually and in their respective official capacities above set forth and all persons acting or assuming to act under their direction, enjoining and restraining them until the further order of this court from

(a) Requiring the plaintiff to furnish the statements, information and financial data demanded in the aforesaid letters of the

Board dated November 26, 1943, and May 23, 1944, or from requiring the plaintiff to commence renegotiation, or to renegotiate the aforesaid charter agreements entered into between the plaintiff and the British Ministry of War Transport;

(b) Determining or attempting to determine in any manner, that any of the payments or any portion thereof made to the plaintiff under the terms of said charter agreements represent "excessive profits" as such term is defined in the Renegotiation Act;

(c) Refixing or attempting to refix the contract price or charter hire of any of the said charter agreements;

(d) Withholding or instructing or requesting the United States or any instrumentality, agency, officer or agent of the United States to withhold any moneys due or to become due to plaintiff from the United States or any agency or instrumentality thereof under contracts with the United States or any agency or instrumentality thereof or otherwise;

(e) Further proceeding in any manner whatsoever to enforce the provisions of the Renegotiation Act against the plaintiff with respect to the aforesaid charter agreements entered into by it with the British Ministry of War Transport.

(f) Causing to be initiated criminal prosecutions against the plaintiff, its officers or employees for failure to furnish the statements, information, and financial data demanded by defendants with respect to the charter agreements entered into by the plaintiff with the British Ministry of War Transport.

(2) That such temporary restraining order be continued in force as an interlocutory injunction until final determination of this action.

(3) That upon final hearing of this cause, the interlocutory injunction herein prayed for be made permanent.

(4) That the Court, pursuant to the provisions of the Federal Declaratory Judgment Act, Title 28 U. S. C., Section 400, declare and decree that the aforesaid charters entered into by the plaintiff with the British Ministry of War Transport, an agency of the British Government, are not subject to the provisions of the Renegotiation Act and that said Renegotiation Act is unenforceable against the plaintiff with respect to said charter agreements and that the demand to submit statements, information and financial data, and the purported commencement of renegotiation proceedings by the defendants with respect thereto, is invalid and unauthorized in law.

(5) That the plaintiff have such other and further relief as the nature of the case may require and as to the court may seem just and proper.

BON GEASLIN,
ALLEN J. KROUSE,
Attorneys for Plaintiff,
520 Investment Building, Washington, D. C.

[Duly sworn to by J. W. O. Von Herbulis, jurat omitted in printing.]

Exhibit A

United States Maritime Commission, Washington

Administrative Order No. 61

To All Employees of the United States Maritime Commission:

For the purpose of carrying out the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, insofar as relates to renegotiation of contract and subcontracts thereunder and for related purposes, there is hereby created a Board to be known as the "Price Adjustment Board of the Maritime Commission."

The Board shall consist of a Commissioner of the Maritime Commission to be designated by the Chairman of the Commission, a representative of the Division of Finance to be designated by the Director of Finance with the approval of the Maritime Commission, and a third member who shall be selected with the approval of the Chairman of the War Production Board as his representative. Additional members of the Board shall be appointed by the Commission from time to time should it appear advisable. The Commission member shall act as Chairman of the Price Adjustment Board.

The Board is hereby charged with responsibility for bringing about such review of contract and subcontract prices as it may deem to be desirable, renegotiating, or causing to be renegotiated, such contract prices when, in its judgment, such action is necessary or desirable, and making such recommendations to the Commission as may be appropriate to effectuate the results of such renegotiations.

The Board is also instructed whenever appropriate to function jointly with representatives or agencies of the Navy Department, the War Department, the War Production Board, and other Departments or Agencies of the Government.

To that end, the Board shall have the collaboration of the Commission's Purchase and Supply, Production, Finance, and Legal Divisions, and of such other officers and divisions of the Commission as may be appropriate, and in cases where it appears that costs or profits of contractors or subcontractors are, or may be excessive for any reason, shall initiate and be responsible for suitable action with a view to securing adjustments and refunds.

The Board shall exercise such other powers not inconsist-
17 ent with this order as may be delegated to it by the Commission or by the Chairman of the Commission. The Construction Review and Analysis Section of the Division of Finance, in conjunction with the General Auditor of Construction will act as fact-finding agency for the Price Adjustment Board, and will, upon the request of the Price Adjustment Board, conduct, or cause to be conducted, investigations into the cost and profits of any contracts or subcontracts in which the Commission is interested.

The Price Adjustment Board, the Construction Review and Analysis Section and the Commission's General Auditor of Construction are authorized to make use of the facilities of the Securities and Exchange Commission, Federal Trade Commission, and other proper departments or agencies of the Government in securing and assembling information.

The Price Adjustment Board is also authorized to call upon the Cost Analysis Section of the War Production Board to conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, and through the Secretary of the Commission may request the Bureau of Internal Revenue to make available its services, with the approval of the Secretary of the Treasury, for the purpose of making examinations and determinations with respect to profits under such contracts or subcontracts. No audit shall be made pursuant to Executive Order No. 9127 without first advising the Cost Analysis Section of the War Production Board. This provision, however, does not apply to audits made in the normal course of the Commission's business otherwise than pursuant to such Executive Order.

All cost analysis reports and all information obtained from contractors, or otherwise by or for the Price Adjustment Board of the Maritime Commission, shall be available at all times to the corresponding Price Adjustment Boards of the War and Navy Departments and to the War Production Board.

18 Where contractors have contracts with either or both of the War and Navy Department, as well as with the Commission, the Price Adjustment Board of the Commission shall

agree with the Price Adjustment Board or Boards of the Departments involved as to how and by whom negotiations shall be conducted.

The Board shall keep a written record of each action taken by it. The Board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors.

By Order of the

UNITED STATES MARITIME COMMISSION,
(Sgd.) W. C. PEET, JR., *Secretary.*

MAY 5, 1942.

Exhibit B

CHARTER

JULY 10, 1941.

It is this day mutually agreed between Waterman Steamship Corporation Owners of the Steamship S. S. "Ipswich" of 3,448 tons net register, classed First Class American Bureau of Shipping now trading and British Ministry of War Transport Charterers, as follows:

1. That the said steamship, being tight, staunch, and strong, and in every way fitted for the voyage and, according to Builders' scale and plan, which Owners believe to be correct but do not guarantee, has 425,788 cubic feet bale space available for cargo and shall load at not more than two United States Atlantic Coast ports, north of Cape Hatteras, but not east of Portland, Maine, according to custom of port, a cargo of lawful merchandise, which Charterers shall furnish subject to Clause 25, and being so loaded shall therewith proceed as ordered when Bills of Lading
19 are signed to not exceeding two ports of discharge in the Gulf of Aden and the Red Sea range not beyond Suez, or so near thereunto as she may safely get and there, always afloat, deliver the cargo as customary, at such wharf, dock or other good and safe place as Charterers' Agents may direct on arrival, in consideration whereof Charterers shall pay the vessel freight as follows:

Seventy-five cents (75c). United States Currency, net per cu. ft., on the bale cargo capacity, as above stated.

For on-deck cargo Sixty cents (60c). United States Currency net per cu. ft. on cubic measurement of such cargo carried.

Entire freight to be prepaid, without discount, and except as provided in clause 2 (Two), to be considered as earned and not returnable, vessel and/or cargo lost or not lost.

If the Charterers find it necessary to discharge at port or ports other than in the range named above then the Charterers may order the vessel to discharge at not exceeding two ports in any one of the following ranges: Capetown-Mombasa, Persian Gulf, Karachi-Bombay.

If under these circumstances vessel discharges in ranges last named, the Owners shall refund to Charterers the following sums:

(a) Port or ports in Capetown-Mombasa range—Thirty cents (30c) per cubic foot bale space on which original freight was paid and Twenty-four cents (24c) per cubit foot of cubic measurement of on-deck cargo;

(b) Port or ports in Persian Gulf Twenty cents (20c) per cubic foot bale space on which original freight was paid and Sixteen cents (16c) per cubic foot of cubic measurement of on-deck cargo;

(c) Port or ports in Karachi-Bombay range Twenty-five cents (25c) per cubic foot bale space on which original freight was paid and Twenty cents (20c) per cubic foot of cubic measurement of on-deck cargo.

Vessel shall not be required to discharge in more than one range.

Confirmation of discharging ports as ordered on sailing to be given on vessel's arrival off Mombasa within 12 hours. If longer detained awaiting orders, such additional time to count as lay days.

2. If by reason of changed conditions the Owners and Charterers agree, or in case of disagreement, the United States Maritime Commission determines, that the voyage shall not be prosecuted further or not completed, and the vessel is not lost and does not discharge at a port or ports, Capetown or beyond, adjustment of freight shall be made on the basis of U. S. $2,250 per day vessel is used by Charterer.

3. Steamer to have liberty to sail with or without pilots, and to tow and assist vessels in all situations. Steamer to have liberty to call at any port or ports en route or not, for fuel, and or supplies.

4. Charterers to have the privilege of designating wharves, or other good and safe places for loading or discharging. The cargo to be brought to, and taken from alongside the steamer, at Charterers' risk and expense, any custom of the port to the contrary notwithstanding. Lighterage, if any, at discharging port for the account of the cargo. Steamer to supply steam to drive winches, and to give use of gear on board vessel, also to load or discharge at night, on Sundays or holidays or on day when notice is given if required by Charterers. Charterers to pay all ex-

penses and labor incurred on cargo, including overtime to crew for cargo working purposes.

5. Charterers are to load, stow, and trim the cargo at their own expense, under the direction of the Master. Charterers to pay all port charges incidental to the outward cargo at loading port or ports, including elevating, stevedore, tallying, watching, clerking, top-wharfage, and to provide and fill sacks required to secure bulk grain, also all necessary shifting boards, dunnage, and
21 dunnage mats, if required, but Owners to pay all other charges at loading port.

6. Charterers' Agents to pay cost of discharging cargo, and all port charges incidental to the cargo at the discharging port or ports to which steamer may be ordered, but the Owners to pay all other charges at the discharging port or ports.

7. Charterers to have use of any dunnage or mats, etc., as may be aboard.

8. The steamer shall be consigned to Charterer's Agents at ports of loading and discharge, and shall employ their Broker to attend to the ship's business.

9. The Charterer's Agents shall sign Bills of Lading in behalf of the Master as and when presented, without prejudice to this charter party. The Captain, officers, and crew of the vessel in supervising loading, stowing, trimming, tallying and discharge of cargo shall be deemed the agents of the Charterers, except in so far as such supervision pertains to the safety of the vessel. Except as otherwise provided in this Charter, neither the vessel nor the Owner shall be liable for shortage, damage, breakage, leakage, shrinkage, or any other condition in respect to cargo arising without the actual fault and privity of the Owner and without the fault or neglect of Agents or servants of the Owner.

10. Lay days at port or ports of loading to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness whether vessel is in berth or not. Should the Steamer not be ready to load on or before noon of August 30, 1941, the Charterers have the option of cancelling this charter party. Lay days at port or ports of discharge to commence on the day following receipt by Charterer's Agents of Captain's written notice of readiness, whether vessel is in berth or not.

11. If the Steamer be not sooner dispatched cargo to be loaded and discharged in a total of twelve (12) running days. Should the cargo not be loaded at loading port or discharged at
22 port of distination within the specified time, for each and every day over and above said lay days, Charterers are to pay, day by day, the sum of $2,250 United States Currency, per day demurrage, any detention through Quarantine to vessel not

to count in lay days. Lay days allowed for loading and discharging are reversible. Lay days not to include time steaming between ports.

12. The Clauses herein regarding payment of port charges, stevedores, etc., at ports of loading and discharge refer only to such charges as are ordinarily incurred, any extra expenses caused by the steamer being under average, are to be adjusted in the usual way. All spaces to be placed at Charterer's disposal, which would be used for cargo, if loading for Owner's account, and where cargo has been carried before.

13. Throughout this charter-party the following are always mutually excepted: The Act of God; perils or accidents of the sea; causes beyond the shipowners or charterers control; restraint or interference or compliance with any directions whatsoever by any Government; fire from any cause whatsoever or wheresoever occurring, unless caused by the actual fault or privity of the Owner or Charterers, as the case may be; war, hostilities, rebellion or civil commotion even though existing or anticipated when this charter is made or any bills of lading signed or voyage commenced hereunder; enemies, pirates, riots, strikes, lockouts, stoppage, shortage or lack of labor or labor troubles of the shipowner's employees or others; fault or error in the management or navigation of the vessel; unseaworthiness, latent or other defect even though existing at delivery or beginning of any volage not resulting, however, from Owner's want of due diligence. Notwithstanding anything to the contrary in this charter-party, the Owner shall be entitled to any exemptions from or limitations of liability afforded by any statute or rule of law for the time being in effect.

14. Owners shall furnish Charterers with a copy of Vessel's scale and plan showing cubic capacities of all holds and spaces upon signing of this charter-party.

23 15. The bale capacity of 425,788 cubic feet, according to builder's plan includes deep tank with a total bale capacity of (no deep tank) cubic feet. Freight is not payable on the deep tank space unless cleaned, fitted, and in every way made useable for cargo by Owners.

16. This charter-party includes, and all bills of lading issued hereunder shall include, subject to clause 1 of this charter, Chamber of Shipping War Clauses 1/2/3 August 1937:

WAR RISK CLAUSE

"1. The Master shall not be required or bound to proceed to any blockaded port or for any port which the Master or Owners in his or their discretion consider dangerous or impossible to enter or to reach nor to sign bills of lading for any such port.

"2. (A) If any port of discharge named in this charter-party or to which the vessels may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or

"(B) If owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port or discharge of cargo intended for any such port be considered by the Master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the Master or Owners in his or their discretion dangerous or impossible for the vessel to reach such discharging port—the cargo or such part of it as may be affected shall be discharged at any other safe port in the vicinity of the said port of discharge as may be ordered by the Charterers (provided such other port is not blockaded or that entry thereto or discharge of cargo thereat is not in the Master's or Owner's discretion dangerous or prohibited). If no such orders be received from the Charterers within forty-eight (48) hours after they or their agents have received from the Owners a request for the nomination of a substitute discharging port, the owners shall then be at liberty to discharge the
24 cargo at any safe port which they or the Master may in their or his discretion decide on and such discharge shall be deemed to be due fulfillment of the contract or contracts of affreightment so far as cargo so discharged is concerned. In the event of cargo being discharged at any such other port the Owners shall be entitled to freight as if the discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the bills of lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses.

"3. The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destination, zones, waters, delivery, or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

"If by reason of or in compliance with any such direction or recommendation the vessel does not proceed to the port or ports

originally designated or to which she may have been ordered pursuant to any safe port which the Master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of the contract or contracts of affreightment and the Owners shall be entitled to freight as if discharge had been effected at the port or ports originally designated or to which the vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port shall be paid by the Charterers and/or Cargo Owners, and the Owners shall have a lien on the cargo for freight and all such expenses."

17. This charter-party includes, and all bills of lading issued hereunder shall include the New Jason Clause, reading:

"In the event of accident, danger, damage, or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods."

General average, if any, to be according to York Antwerp Rules, 1924, Rule F, 1-15 inclusive and 17-22 inclusive. Owners shall be entitled to appoint General Average adjusters.

18. This charter-party includes, and all bills of lading issued hereunder shall include the Both-to-Blame Collision Clause reading:

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or noncarrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or noncarrying ship or her owners as part of their claim against the carrying ship or carrier."

26 19. All bills of lading issued hereunder shall include the Clause Paramount reading:

CARRIAGE OF GOODS BY SEA ACT OF 1936

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

20. A regular line bill of lading on booking agents' form to be used and all such bills of lading covering Charterer's cargo to be claused as follows: "All terms and conditions and exceptions of the charter-party dated New York July 10, 1941, are hereby incorporated." This clause will not appear on bills of lading for commercial cargo, but Charterer's Agents to cover the Owner's liability with separate P & I coverage.

21. Charterers to comply with all Government regulations relating to loading, stowage and discharge of dangerous cargo.

22. Charterers shall be responsible for fulfillment of all requirements of Neutrality Act of 1939 of the United States including any amendments thereof and all proclamations, rules, and regulations thereunder so far as they relate to cargo.

23. On-deck cargo to be carried at sole discretion of Master and at the risk of Charterers and or Owners of such cargo.

24. The freight to be paid under this charter is predicated on obtaining war risk insurance at a rate of 5% into the Red Sea on a valuation of $800,000. Any increase in this war risk insurance rate into the Red Sea to be added to the total freight, and reduction to be deducted.

27 25. Charterer has the privilege of securing commercial or other lawful cargo to complete ship, or fill broken storage space, to insurance charterers securing maximum use of ship's capacity. The revenue on such cargo, less cargo handling expenses, P. & I. insurance premiums to cover B. I. risk, deduction for cargo claims, brokerage if any and a commission of 5% to the booking agent (named in clause 8) to be credited to the Charterer.

26. Vessel to be berthed in United States ports at piers or terminals and to use facilities designated by the Charterer and ap-

proved by an authorized representative of the United States Maritime Commission. Consideration will be given to the use of Owner's terminals and facilities where practical.

27. Charterers have privilege of appointing booking or loading agents in the United States approved by the United States Maritime Commission, but Owners not required to pay for this service in excess of one-fourth cent (¼c) per bale cubic as above, subject to a maximum of One Thousand Dollars ($1,000). Charterer's Agents to be used at discharge ports and for which agency fees will be allowed in an amount not exceeding one hundred and twenty-five dollars ($125) for each port.

28. This charter not to become effective until approved by the United States Maritime Commission. If any dispute arises under this charter the same is to be settled by the United States Maritime Commission.

WATERMAN STEAMSHIP CORPORATION,
WATERMAN STEAMSHIP AGENCY, LTD.
As Agents.
JAMES J. MANN, *Vice-President.*
BRITISH MINISTRY OF WAR TRANSPORT,
Representative in the U. S. A.
(Signed) JOHN GAMMIE, *Deputy.*

* * * * *

28 *Exhibit E*

(Copy)

OFFICE FOR EMERGENCY MANAGEMENT DIVISION OF DEFENCE AND REPORTS

WASHINGTON, D. C.

JUNE 9, 1941.

Re: Red Sea Service Requisition No. 1503A

BRITISH MERCHANT SHIPPING MISSION,
Willard Hotel, Washington, D. C.
Attention Mr. R. R. Powell, Secretary.

DEAR MR. POWELL: The following arrangement with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission shall be effected:

A. The United States Maritime Commission will make the following payments required to be made to the owners or chartered owners by the British Ministry of War Transport under the terms of the charter:

1. Freight required to be paid under Clause 1 of the charter.

2. Demurrage, if any, required to be paid under Clause 11 of the charter.

3. Any increase in charter hire which may become payable under Clause 24 of the charter.

4. Loading and other expenses payable by the charterer under Clauses 4 and 5 of the charter.

B. The U. S. Maritime Commission shall receive any payments to be made by the owners or chartered owners pursuant to adjustment or reduction of charter hire under the charter which includes:

1. Refunds which may be made under Clause 1 of the charter.

2. Adjustments of freight which may be made under Clause 2 of the charter.

3. Net amounts which may become payable under Clause 25 and reductions in freight resulting from any reduction in insurance rates under Clause 24 of the charter.

The foregoing arrangement will be effective on vessels covered by requisition No. 1503A and on all future vessels which sail from U. S. loading ports to the Red Sea until further notice. It is understood, however, that such arrangement will be the subject of further discussion in connection with any changes which may be made in the near future in the charter arrangement.

Sincerely yours,

(Signed) J. H. BURNS,
Major General, U. S. Army.

Exhibit F

(Copy)

NOVEMBER 26, 1943.

Subject: Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation

Registered Mail—Return Receipt Requested.

WATERMAN STEAMSHIP AGENCY, LTD.,
Agents for Waterman Steamship Corporation,
19 Rector Street, New York, New York.

GENTLEMEN: Price Adjustment Boards, pursuant to an Act of Congress, sometimes referred to as the "Renegotiation Act," have been established in the War, Navy, and Treasury Departments, the Maritime Commission, the War Shipping Administration, and the Reconstruction Finance Corporation. The function of these Price Adjustment Boards is (1) to review the profits realized from prices in effect under contracts

and subcontracts subject to renegotiation under the Act, and (2) to arrive at a settlement of the amount of excess profits, if any, realized under the Act by the contractor, and, if none, to give him a clearance of liability therefor.

The renegotiation for your company has been assigned to the Commission's Price Adjustment Board.

Notice is given hereby that an initial conference with the Maritime Commission Price Adjustment Board is hereby set for 10:00 A. M., War Time, on December 13, 1943, at the office of the Board, Room 4879, Department of Commerce Building, Washington, D. C. (telephone: Executive 3340, Extension 606).

In the event that the time so fixed is not satisfactory to you, the Board will entertain a request in writing in the form hereto attached, for a continuance of such conference to a date not later than sixty (60) days from the date hereinabove fixed, provided that such request is received at the Board's address above not later than five days preceding the date hereinabove fixed.

It is requested, however, that at such initial conference the Commission's Price Adjustment Board be furnished with the following:

1. A detailed break-down of terminated voyage revenue and expense and other income and expense during the calendar years 1941 and 1942, as between Government and commercial, showing separately the operation under Maritime Commission (British Ministry of War Transport) Charter Parties of the vessels S. S. "West Kysha," "Pan Kraft," "Jean Lafitte," "Ipswich," "Iberville," "Andrew Jackson," "Bienville," "Antinous," "Lafayette," "Beauregard," "Gateway City," and "LaSalle."

31 (a) Government revenue is that received by you as owner or charterer where the voyage was made for the end use of one of the Government agencies above named.

(b) Commercial revenue is that received by you from private charterers where the voyage had no connection with activities carried on by one or more of the Government agencies above named.

2. A detailed breakdown of overhead in said period with a suggested allocation of same as between Government and commercial, showing separately that part which in your opinion should be allocated to the operation under Maritime Commission (British Ministry of War Transport) Charter Parties covering vessels above referred to.

3. An analysis of depreciation.

4. Salaries and all other compensation (including commission, bonuses, royalties, and other forms of extra compensation) of

your officers and employees who received in excess of $10,000 per annum each for the years 1940, 1941, and 1942.

5. Salaries, if any, above stated which were questioned by the Federal income tax authorities.

6. A brief description of any bonus plan, pension trust or other employee compensation plan in effect during the years 1940, 1941, or 1942.

7. An analysis of noncurrent liabilities to holding or subsidiary companies and of floating equipment reserves.

8. Certified or photostatic copy of income and excess profit tax return for the period, with supporting schedules for your company and your subsidiaries or affiliates.

You are at liberty at the initial conference to submit reasons why you cannot furnish the information within the requested period, as well as to state reasons why you are not subject to renegotiation. If you have filed with any other Government agency all or any part of the information, it is requested that you forward to us copies thereof or designate the agency and official to whom it was sent.

32 It is anticipated that after this information has been analyzed by us—no extended period is required for that analysis—a mutually satisfactory determination can be made as to whether you have realized excessive profits, within the meaning of the Act.

Very truly yours,

(Signed) JOHN R. PAULL,
Price Adjustment Board.

Attachment

Form B-A
1

LPI Attachment Application for Continuance of Initial Conference

In the Matter of the Renegotiation of _____, Contractor, _____, 194—.

To: MARITIME COMMISSION,
Price Adjustment Board,
Room 4879, Department of Commerce Building,
Washington 25, D. C.

The undersigned contractor hereby requests a continuance to _____, 194 , at 10:00 A. M., War Time, of its initial conference with the Maritime Commission Price Adjustment Board in the renegotiation with the undersigned contractor which has been commenced pursuant to Section 403 of the Sixth

Supplemental National Defense Appropriation Act 1942, as amended.

_____,

Contractor.

[CORPORATE SEAL] By _____,

A general executive officer of the corporation.

33 *Excerpts from Exhibit G*

III. INTERPRETATIONS OF THE STATUTE

The following interpretations of the statute represent the present opinion of the Departments and the Commission and are subject to such revision from time to time as may appear desirable as a result of the operation of the boards under these interpretations. They are issued for information only and are subject to change without notice. To facilitate the issuance of changes, these interpretations are designated J-PAB-1 to J-PAB-12, inclusive.

J-PAB-1.

1. Contracts and subcontracts subject to renegotiation.—Under subsection (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public, No. 528, 77th Cong.), approved April 28, 1942, as amended by section 801 of the Revenue Act of 1942 (Public, No. 753, 77th Cong.), approved October 21, 1942, whenever in the opinion of the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, or the Chairman of the Maritime Commission (each being hereinafter referred to as the "Secretary"), the profits realized or likely to be realized on any contract or contracts with such Department or Commission (each being hereinafter referred to as the "Department"), or from any subcontract or subcontracts thereunder, whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the prices of such contracts and subcontracts to eliminate any excessive profits thereunder.

The provisions of section 403 relate to all contracts entered into by the War and Navy Departments and the Maritime Commission. Contracts of the Treasury Department subject to renegotiation include:

(1) Contracts placed under section 201 of title II of the First War Powers Act, 1941, 55 Stat. 839 (principally lend-lease contracts, which may be identified by the symbols "DA-TPS" preceding the contract number);

34 (2) Contracts for strategic and critical materials placed under the authority of the Act of June 7, 1939, 53 Stat. 811 (such contracts made after March 1, 1943, may be identified by the symbols "SCM-TPS" preceding the contract number);

(3) Contracts for supplies for refugee relief under the Red Cross program, placed under the authority contained under title III of the Third Supplemental National Defense Appropriation Act, 1942, 55 Stat. 817 (such contracts may be identified by the symbols "TRR" preceding the contract number).

Other types of contracts regularly entered into by the Procurement Division of the Treasury Department in the ordinary course of business prior to the war period, as such, are not subject to renegotiation unless negotiated under authority contained in title II of the First War Powers Act, 1941. However, purchase orders, issued by the War and Navy Departments and the Maritime Commission under General Schedule of Supplies Contracts, which are entered into by the Procurement Division of the Treasury Department on behalf of all departments and establishments of the Government, are considered as being subject to the provisions of section 403. Purchase orders issued by the Treasury Department itself under such contracts are also considered as being subject to the provisions of section 403 if such purchases are for lend-lease or for the Red Cross program.

All so-called lend-lease contracts entered into by the War Department, the Navy Department, the Treasury Department, and the Maritime Commission are subject to the provisions of section 403. However, lend-lease contracts entered into by any other department or agency of the Government are not subject to renegotiation under existing law.

Subsection (c) of section 403 is applicable to all such contracts and subcontracts, whether or not such contracts or subcontracts contain a renegotiation clause, unless (i) final payment
35 pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor; provided, however, no renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract occurs.

The term "subcontract" as used in subsection (c) is defined to mean any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term "article" is defined to include any material, part, assembly, machinery, equipment, or other personal property. This definition of "subcontract" is much broader than under the Vinson-Trammell Act, in that profits on the production and sale of articles required for the performance of another contract or subcontract are subject to renegotiation, as well as profits on the production or sale of all materials incorporated into the end product, down to and including raw materials, except in the case of certain specified raw materials exempted under subsection (i) (1) (ii) of the statute. This definition is interpreted to include contracts with contractors and subcontractors (a) for the sale or processing of an end product or an article incorporated therein, (b) for the sale of machinery or equipment used in the processing of an end product or of an article incorporated in an end product, (c) for the sale of component parts of or subassemblies for such machinery or equipment, and (d) for the performance of personal services required for the performance of the contracts and subcontracts included in (a), (b), and (c).

36 An allocation is made of sales of such machinery and equipment based on the nature of the use thereof (i. e., war or commercial production) and to the extent to which the production of the purchasers to whom such sales are made is subject to renegotiation, such sales are considered renegotiable. Thus if 60% of the sales of the purchasers to whom such machinery and equipment are sold is renegotiable, such sales of machinery and equipment are considered renegotiable to the same extent. In those cases where it is unduly burdensome or impractical to trace the end use of individual items of machinery or equipment, the Departments frequently make this determination on the basis of industry-wide estimates or by some other method mutually agreed upon.

The term "article" has also been interpreted to include commercial products as well as equipment fabricated for particular uses or purposes. The fact that commercial products are sold for industrial uses, either directly or through jobbers or other commercial channels, does not exclude such articles from this definition. The same tests are applied to both ordinary commercial products and equipment fabricated for special uses and purposes.

The fact that all or part of such articles are sold under price ceilings fixed by the Office of Price Administration does not ex-

clude such articles from this definition, or exempt profits made on the sale thereof from renegotiation.

J-PAB-2 (a).

2. Exemptions.—2 (a) Payments before April 28, 1942.—Contracts and subcontracts are not subject to renegotiation under the statute if final payment pursuant to such contract or subcontract was made prior to April 28, 1942. If final payment on a contract or subcontract was not made prior to April 28, 1942, profits made thereunder at any time, even in years prior to 1942, are subject to renegotiation. The Departments have adopted the policy that this provision with respect to payment before April 28, 1942, will be interpreted so that payment will be deemed
37 to have been made although certain relatively small unliquidated items may not have been finally determined and paid for.

This exemption raises the legal question of when a series of transactions constitute one contract or several contracts. If the transactions constitute one contract and final payment had not been made before April 28, 1942, then all the transactions thereunder are subject to renegotiation. If, however, the transactions constitute several contracts, then only those contracts on which final payment had been made before April 28, 1942, are exempt. This question arises frequently in cases involving reorders and orders under option agreements, periodic deliveries under purchase orders, and other similar circumstances. In determining whether an order for further quantities or work constitutes a new and separate contract, the test is whether a new or additional promise is given by the contractor with respect to the additional order, or whether this additional quantity or work is covered by an option, or otherwise, under the initial contract.

J-PAB-2 (b) (i).

2 (b) (i) Fixed exemptions: Contracts with other governmental agencies; Defense Plant Corporation.—Subsection (i) (1) (i) of the statute provides that the statute shall not apply to any contract by a Department with any other department, bureau,

* * * * *

J-PAB-4

4. Statutes of limitation.—The statute provides two statutes of limitation, one on the renegotiation of individual contracts and the other on renegotiation for an expired fiscal year or years.

(a) Renegotiation of individual contracts.—No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year

after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the con-
38 tract or subcontract as determined by the Secretary, occurs. (See subsection (c) (6).) The Departments interpret this provision to mean that renegotiation commences on the specific date set by the Department conducting renegotiation for the initial renegotiation conference unless otherwise agreed by the contractor.

The question has arisen as to whether the term "completion * * * of the contract," as used in this provision, means final delivery, acceptance or payment. The Departments have adopted the view that completion of the contract means final delivery or acceptance under the contract, rather than final payment, and the fact that a contractor may still have certain obligations under guarantees of performance or the fact that there may be unliquidated items outstanding does not extend the time of completion beyond the date of final delivery or acceptance.

(b) Renegotiation for prior years.—Any contractor or subcontractor may file with the Secretaries of the Departments concerned financial statements for any prior fiscal year or years, in such form and detail as the Secretaries shall prescribe by joint regulation. The Secretary of each such Department has one year thereafter within which he may give written notice of renegotiation, in form and manner to be prescribed in such joint regulation, fixing a date and place for an initial conference to be held within 60 days, and unless such notice is given by one of the Secretaries and renegotiation commenced by such Secretary within 60 days, the liability of the contractor or subcontractor for excessive profits realized during such year or years will be discharged. (See subsection (c) (5).)

A joint regulation prescribing the form of the financial statements which the contractor or subcontractor may file was promulgated as of February 1, 1943.

J-PAB-5.

5. Recognition of exclusions and deductions allowed for Federal tax purposes.—Under subsection (c) (3) of the statute, as amended, the Secretary in determining the excessiveness of
39 profits must "recognize the properly applicable exclusions and deductions of the character" which the contractor or subcontractor is allowed under chapter 1 and chapter 2 E of the Internal Revenue Code. Since those items must be properly applicable to the profits from the contracts and subcontracts being renegotiated, they must be allocated between the renegotiable and nonrenegotiable business, even though the full amount is allowed for tax purposes. The words "of the character" disclaim the

implication that the renegotiating authorities are required to compute and allow the actual dollar amount of exclusions and deductions which the Bureau of Internal Revenue would allow.

* * * * *

Exhibit II

520 Investment Building

WASHINGTON, D. C.

December 13, 1943.

Subject: Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation

Mr. John R. Paull,
Price Adjustment Board,
U. S. Maritime Commission, Washington, D. C.

Dear Mr. Paull: Receipt is acknowledged of your letter of November 26, 1943, addressed to the Waterman Steamship Agency, Ltd., as Agents for Waterman Steamship Corporation, which has been referred to the Corporation for reply. The communication purports to be a notice of an initial conference with the Maritime Commission Price Adjustment Board which has been set for 40 10:00 A. M., War Time, on December 15, 1943, at Room 4879, Department of Commerce Building, Washington, D. C.

In the notice you request certain information for the calendar years 1941 and 1942 with respect to the operation of certain vessels named in the notice, owned by the Waterman Steamship Corporation and its subsidiary, under Charters entered into between the Corporation and the British Ministry of War Transport, and commonly referred to as the Red Sea Charters.

It is respectfully submitted that these Charters are not subject to the provisions of Section 403 of Title IV of the 6th Supplemental National Defense Appropriation Act of 1942, approved April 28, 1942, as amended by the 1942 Revenue Act, for the following reasons:

1. The Charters were not entered into with any "Department" as defined in the Act, but were charters made directly with the British Ministry of War Transport, an Agency of the British Government.

2. Paragraph 6, Section 403 (c) provides that no contract made with a "Department" as defined in the Act, shall be subject to renegotiation where final payment pursuant to such contract was made

prior to April 28, 1942. The final payments of the Charter Hire on each of the vessels listed in the notice were made long prior to that date.

3. Even if it could be shown that the charters were made with a "Department" within the meaning of the law, the Act provides that no renegotiation of any contract shall be commenced more than one year after the close of the fiscal year of the Contractor within which completion or termination of the contract, as determined by the Secretary of the Department, occurs. The Waterman Steamship Corporation completed its obligations under these charters on various dates; the latest of which was January 6, 1942, and the Charters were terminated on those respective dates. The fiscal year of the Waterman Steamship Corporation ends on September 30 of each year. Therefore, more than one fiscal year
41 has intervened since the termination of these Charters, and no renegotiation was commenced within the period prescribed by the Statute. The fact that certain claims for demurrage on some of the vessels are still unpaid, does not extend the time for the commencement of renegotiation, since the Secretary has determined that "the fact that there may be unliquidated items outstanding does not extend the time of completion beyond the date of final delivery or acceptance."

4. The Act specifically provides that any contract by a Department with any foreign government or Agency thereof shall not be subject to renegotiation. The payments to the Waterman Steamship Corporation for the account of the British Ministry of War Transport in connection with these Charters, were made pursuant to an arrangement strictly between the Martime Commission and the British Ministry of War Transport to which the Waterman Steamship Corporation was not a party and concerning which it was not consulted. Since under the law that arrangement is specifically exempted from renegotiation, and since the law does not authorize the Commission to do indirectly what it may not do directly, the charters are clearly outside the provisions of the renegotiation statute.

For the reasons outlined above, the Maritime Commission obviously has no authority to renegotiate the so-called Red Sea Charters under the provisions of the Renegotiation Statute.

The Waterman Steamship Corporation and some of its subsidiaries do have other contracts with various agencies of the Government, some of which may be subject to the provisions of Section 403 of Title IV of the 6th Supplemental National Defense Appropriation Act, as amended. The Corporation would like to reach an agreement with your Board as soon as practicable, as to which of its other contracts may be subject to this Act and what information will be required by your Board with respect to

the same. We could, then, proceed with the preparation
42 of the data and fix a mutually satisfactory time, say within about ninety days, for conferences looking to the renegotiation of such of our other contracts as may be subject to the Act referred to above. However, nothing in this communication, nor the participation in any conference with respect to any other contracts between the Waterman Steamship Corporation and any Department, shall be deemed to include the so-called Red Sea Charters, for the reasons outlined above.

With reference to the general subject to renegotiation of contracts and subcontracts, we assume that such amounts as are repaid to the government will accrue to the credit of the Department with which the contract or subcontract was made, and that the cost of construction or furnishing of materials under the contract would be reduced accordingly. It follows, therefore, that in the case of vessels constructed for the account of the Maritime Commission and sold to private operators, the cost of construction of the new vessel and its sale price would be reduced to the extent that the amounts repaid to the Commission pursuant to renegotiation of contracts or subcontracts are applicable to the cost or sale price of the new vessel.

Very truly yours,

BON GEASLIN,
Assistant Vice President.

BG:GB.

43 *Exhibit 1*

(Copy)

UNITED STATES MARITIME COMMISSION
WASHINGTON, D. C.

MAY 23, 1944.

Subject: Christenson Steamship Company, Waterman Steamship Company

MR. BON GEASLIN,
520 Investment Building,
Washington 5, D. C.

DEAR MR. GEASLIN: After considerable study of the entire Red Sea operation, I am satisfied that there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable. On March 11, 1931 the Congress passed "an Act to promote the defense of the United States" and authorized the President "when he deems it in the

interest of National Defense" to authorize the head of any Department of the Government to procure defense articles. On April 30, 1941 the President wrote the Chairman of the Maritime Commission and directed him "as part of the defense effort to which this county is committed" to secure the service of at least 2,000,000 tons of merchant shipping. Pursuant to this direction, the Commission negotiated with the vessel owners. The vessels were made available, a charter party was signed with the British Ministry of War Transport for technical reasons but the commission agreed to pay the vessel owner the agreed compensation for the use of the vessel. This arrangement was evidenced by correspondence between the Commission and the vessel owner.

> There appears to have been mutuality of understanding among all the parties interested, legality of consideration and definiteness as to terms, time of performance and acceptance. Payment was made in due course as agreed and this payment constitutes a part of the cost of the war to the people of the United States.

I make this statement because at the out-set it was understood that I would explore the legal situation independently of the opinion theretofore rendered by Oscar Cox, Esq. and would not ask the vessel owners to go to the trouble of furnishing any financial data until I was satisfied that there was a renegotiable agreement with the Commission.

In view of the foregoing I suggest a conference at this office, 1200 15th Street, Washington, D. C. at 10:00 A. M. on June 3, 1944 with Christenson Steamship Company and at 10:00 A. M. on June 29 with Waterman Steamship Company for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act.

Meanwhile, perhaps you will have some information gotten together for me which may serve to expedite matters and I am enclosing herewith a proposed outline for such information and financial data. I am sure that all this information is readily obtainable from the books of the companies and if it is possible to get it together and send it to me a day or so before the conference, it would be helpful because I should like to make sure that our understanding of the facts is the same.

Very truly yours,

(Signed) KENNETH F. CLARK,
Price Adjustment Board.

Enclosures.

45 STATEMENT IN RENEGOTIATION

STATE OF
County of ss:

I, being duly sworn, depose and say (1) that am an officer to wit—
of , the Contractor signing Exhibits A and B hereto attached;

(2) that I am duly authorized to execute this statement on behalf of said Contractor;

(3) that I am familiar with the income and other financial data of said Contractor and have access to all the books and records of said Contractor;

(4) that I have reviewed and verified the general information, financial data and specific voyage data as to each vessel in the Red Sea operation hereto attached as Exhibit A;

(5) that attached hereto as Exhibit B is a statement of the facts and factors relating to the Contractor's renegotiable business during its fiscal year ended 31, 1941 and 1942 which should be considered in renegotiation;

(6) that attached hereto Exhibit C is a statement with respect to the Contractor's shipping operations in 1941 and 1942 over different trade routes (exclusive of the Red Sea) showing as to each trade route (a) the number of vessels engaged, (b) total DWT months, (c) gross operating revenue, (d) operating cost, (e) overhead, (f) depreciation, and (g) net profit before Federal taxes on income;

(7) that attached hereto are photostatic copies of the Contractor's Returns for Federal taxes measured by income as filed for the fiscal years ended 31, 1941 and 1942 respectively;

(8) that upon information and belief the said information and financial data set forth in Exhibits A, B and C are true and accurate and that to my best knowledge, information and be-
46 lief the Contractor has not omitted to state any material fact required to make the Contractor's representations complete or the omission of which would make such representations misleading.

Subscribed and sworn to before me this day of 1944.

Exhibit A

GENERAL INFORMATION

Contractor
Address
State of incorporation
Date of incorporation, if any
Parent company
Subsidiaries
Affiliated companies
Capital Stock outstanding

Common—number of shares Par Value
Preferred—number of shares Par Value

FINANCIAL DATA

Fiscal Year	1936	1937	1938	1939	Average (1936–1939)	1940	1941	1942
Net worth at beginning of period								
Gross profit on shipping operations							(*)	(*)
Other income								
Costs including:								
Overhead								
Depreciation								
Total								(*)
Net profit before adjustment for Federal taxes on income								
Dividends paid								

*Attach schedule segregating revenue, cost and net profit attributable to contracts with Departments within the scope of the Renegotiation Act of 1942 other than Red Sea voyage revenue and cost

47 Dated 1944

By ----------
President or Treasurer.

RED SEA VOYAGE DATE

(Show each vessel operation separately but on one schedule, if possible)

Vessel
Voyage began
Voyage ended
Number of voyage days
Dead Weight tons
Dead Weight ton months
Bale capacity in cu. ft.
On deck cargo space cu. ft.

*Insurance valuation
Space charter hire
Date paid
Amount
Demurrage
Date paid
Amount
Voyage Revenue
Outward
Intermediate
Inward
Total
Owners Expense—time form charter
Charterers Expense—time form charter
Total Direct voyage expense
**Direct voyage profit
Overhead
Depreciation
Dated 1944

By ----------
President or Treasurer.

48 * In event of loss of vessel show amount of final insurance settlement.

** Indicate in what tax period profits were returned for Federal tax purposes.

* * * * *

In United States District Court

Motion for preliminary injunction

Filed June 28, 1944

Plaintiff, the Waterman Steamship Corporation, a corporation, moves the court for a preliminary injunction in the above entitled cause enjoining the defendants and each of them, individually and in their respective official capacities as set forth in the caption of this cause, and all persons acting, or assuming to act under their direction, pending the final hearing and determination of this cause from

(a) Requiring the plaintiff to furnish the statements, information, and data requested in the letters of the defendants, dated November 26, 1943, and May 23, 1944, or from requiring the plaintiff to commence renegotiation, or renegotiate certain charter agreements entered into between the plaintiff and the British

Ministry of War Transport on the vessels Antinous, Iberville, Bienville, Jean Lafitte, Andrew Jackson, West Kyska, Ipswich, Beauregard, Lafayette, Gateway City, Lasalle and Pan Kraft, on the respective dates of April 25, 1941, May 24, 1941, July 10, 1941, August 16, 1941, September 24, 1941, and April 25, 1941;

(b) Determining, or attempting to determine, in any manner that any of the payments, or any portion thereof, made to the plaintiff under the terms of said charter agreements represent excessive profits, such terms defined in the Act of Congress, approved April 28, 1942, and known as the Renegotiation Act;

(c) Refixing, or attempting to refix, contract prices or charter hire of each of said charter agreements;

49 (d) Withholding, or instructing, or requesting the United States or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due, to plaintiff from the United States, or any agency or instrumentality thereof, under contracts with the United States or any agency or instrumentality thereof;

(e) Further proceeding in any manner whatsoever to enforce the provisions of the Act of Congress, approved April 28, 1942, known as the Renegotiation Act, against the plaintiff with respect to the aforesaid charter agreements entered into by it with the British Ministry of War Transport;

The grounds in support of this motion are as follows:

(1) Unless restrained, the defendants will immediately make a determination that a portion of the payments made to the plaintiff under the terms of the charter agreements referred to above represent excessive profits as such term is defined in the Act of Congress, approved April 28, 1942, and known as the Renegotiation Act and will refix the contract price of charter hire of each of said charter agreements and will either file suit against plaintiff to recover such sums so determined as a result of the refixing of the contract price, or charter hire, or will withhold monies due or to become due to plaintiff from the United States, or will instruct or request the United States or any of its agencies to withhold monies due or to become due to plaintiff from the United States under contracts with the United States, or will cause criminal action to be instituted against plaintiff, or its officers and employees for failure to furnish statements, information, and data, requested in letters of the defendants, dated November 26, 1943, and May 23, 1944;

(2) The aforesaid threatened acts by the defendants are illegal, beyond the scope of their authority, and not authorized by the Act of April 28, 1942, known as the Renegotiation Act, under which they are purportedly acting and unless restrained the acts

of the defendants so threatened will constitute a violation
50 of the rights of the plaintiff under the Fifth Amendment of the Constitution of the United States;

(3) Immediate and irreparable injury, loss and damage will result to plaintiff by reason of the aforesaid threatened actions by defendants as more particularly set forth in the verified complaint filed herein;

(4) If the defendants carry into effect the actions so threatened, any judgment which this court may later render on final determination of this cause will be ineffective;

(5) If this preliminary injunction be granted, the injury, if any, to the defendants herein if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

BON GLASLIN,
ALLEN J. KROUSE,
Attorneys for Plaintiff.
520 Investment Building, Washington, D. C.

Notice of motion

Please take notice that the above Motion for Preliminary Injunction is set for hearing in the Motions Court on the 13th day of July, 1944, at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

BON GLASLIN,
ALLEN J. KROUSE,
Attorneys for Plaintiff.

* * * * * *

In United States District Court

Motion to dismiss the petition

Filed July 10, 1944

Now come the defendants herein, by their attorneys, and move the Court to dismiss the complaint herein on the grounds that:

1. The Court lacks jurisdiction over the subject matter of the action.

51 2. The complaint fails to state a claim against the respondent upon which relief can be granted, in that (a) it fails to show any injury to petitioner, irreparable or otherwise; (b) it fails to show that plaintiff has exhausted its administrative

remedies, and indeed, shows affirmatively that plaintiff has not exhausted its administrative remedies.

FRANCIS M. SHEA,
Assistant Attorney General,
EDWARD M. CURRAN,
United States Attorney,
Attorneys for Defendants.

* * * * *

In United States District Court

Memorandum

Filed Aug. 15, 1944

While it is not clear upon what provision or provisions of law the defendants purport to act re plaintiff's claimed peculiar contractual relationship, they have the authority to renegotiate such contracts as come within the purview of the law in question.

The plaintiff counters with the argument that the contracts in question are outside the renegotiation law. This, it seems, brings the matter squarely within the rule laid down in the Myers case (Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41–50–51). Skinner & Eddy Corp. v. U. S. 249 U. S. 557 is distinguished in fact and principle. There is no order here void ab initio, or any order at all.

Motion for preliminary injunction Denied. Motion of defendants to dismiss—Granted.

Counsel will prepare order in consonance with this memorandum opinion.

MATTHEW F. McGUIRE,
Associate Justice.

8/15/44.

* * * * *

52 In United States District Court

Order

Filed Aug. 16, 1944

This cause having regularly come on to be heard before the above-named court on August 7, 1944, upon the motion of plaintiff for a temporary injunction and upon the motion of defendants for dismissal of the action, and counsel for the parties having been heard and briefs filed and considered;

Now, upon said motions and the complaint filed herein the court being of the opinion and having determined, as stated in its memorandum filed herein on August 15, 1944, that this action may not be maintained, it is

Ordered that the plaintiff's motion for temporary injunction be, and it hereby is, denied; and it is further

Ordered that the complaint be, and it hereby is, dismissed.

Dated: August 16, 1944.

MATTHEW F. MCGUIRE,
Associate Justice.

Approved as to form:

ALLEN J. KROUSE,
Attorney for Plaintiff.

53 In the United States Court of Appeals, District of Columbia

April Term 1944

No. 8862

WATERMAN STEAMSHIP CORPORATION, APPELLANT

vs.

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., APPELLEES

Motion for leave to substitute party appellee and to add parties appellees

Filed Feb. 14, 1945

Comes now the appellant in the above-entitled cause and represents to this Honorable Court

(1) That this action is against Emory S. Land, individually and as Chairman of the United States Maritime Commission, Thomas M. Woodward, A. G. Rydstrom, John R. Paull, and Carman G. Blough, individually and as the Chairman and members of the Price Adjustment Board of the Maritime Commission respectively;

(2) That the decision and order of the Court below was entered August 16, 1944, and notice of appeal from such order was filed by appellant on August 18, 1944;

(3) That subsequent thereto the appellee Carman G. Blough became separated from and is no longer a member of the Price Adjustment Board of the Maritime Commission; that Norman L. Burton has been designated as the successor to the said Carman G. Blough as a member of such Board and has entered upon his duties as such;

(4) That on or about August 22, 1944, the following persons were designated and entered upon their duties as members of the Price Adjustment Board of the Maritime Commission, namely, Kenneth F. Clark, Victor B. Gerard, and W. B. Van Houten; that on or about the 23rd day of October 1944,
54 E. Stanley Glines was designated and entered upon his duties as a member of said Board;

(5) That the duties of the above-named persons as members of the Maritime Commission Price Adjustment Board are the same as those alleged in the complaint of record herein, to be the duties of the members of said Board and as specified in Administrative Order No. 64 of the United States Maritime Commission which is marked Exhibit A and attached to and made a part of said Complaint (see Joint Appendix pages 15–18);

(6) That the said Norman L. Burton, Kenneth F. Clark, Victor B. Gerard, W. B. Van Houten, and E. Stanley Glines purportedly acting in their official capacities as members of said Maritime Commission Price Adjustment Board have adopted the arbitrary and unlawful assumption of authority and jurisdiction heretofore asserted by the appellees herein, to exist under the provisions of the Renegotiation Act with respect to the charter agreements entered into by the appellant with the British Ministry of War Transport and have adopted, and intend to and will, unless the relief sought herein is granted, carry out in the manner and by the means alleged in the Complaint, the arbitrary and unlawful determinations made by the appellees that said charters in each case constituted a contract between the appellant and the United States Maritime Commission, to which the Renegotiation Act is applicable, and that excessive profits were realized therefrom; that said persons purportedly acting in their official capacities intend to and will, unless the relief sought in the complaint is granted, arbitrarily and without authority of law enforce against the appellant the provisions of the Renegotiation Act with respect to said charter agreements in the manner and by the means alleged in the complaint;

(7) The allegations contained in the complaint with respect to the arbitrary and unlawful assumption of such authority, purportedly under the provisions of the Renegotiation Act, and the threats of appellees to enforce their unlawful determinations as aforesaid apply with equal force and effect to the said Norman L. Burton, Kenneth F. Clark, Victor B. Gerard, W. B. Van
55 Houten, and E. Stanley Glines who have been designated and entered upon their duties as members of said Price Adjustment Board of the Maritime Commission since the order and judgment of the Court below in this proceeding, and since the

filing of the Notice of Appeal herein, and who are purportedly acting in their respective official capacities as members of such Board with respect to the matters and things complained of in this action.

(8) That said persons individually and in their official capacities as members of the Price Adjustment Board of the Maritime Commission are proper and necessary parties to this proceeding and unless the relief sought in the complaint shall be granted as against such persons individually and as members of said Board, appellant will suffer immediate and irreparable injury as alleged in the complaint against which there does not exist any plain, speedy or adequate remedy at law.

Wherefore, the premises considered, the appellant moves the Court, pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure, and Rule 28 (b) of the rules of this Court:

(1) For leave to substitute the said Norman L. Burton, individually and as the successor in office to the said Carman G. Blough as a party appellee herein;

(2) That pursuant to Rule 21 of the Federal Rules of Civil Procedure and Rule 25 (b) of the Rules of this Court to add as parties appellee herein the said Norman L. Burton, Kenneth F. Clark, Victor B. Gerard, W. B. Van Houten, and E. Stanley Glines, individually and as members of the Maritime Commission Price Adjustment Board;

(3) That the Court issue such order or orders as may be necessary in the premises.

Bon Geaslin,
Bon Geaslin,
Allen J. Krouse,
Allen J. Krouse,
520 Investment Building, Washington, D. C.,
Attorneys for Appellant.

This is to certify that I have this 14th day of February 1945, sent by registered mail copies of the above Motion to each of
56 the following persons at the addresses given opposite their names:

Norman L. Burton, War Production Board, Room 4554, Social Security Building, Washington, D. C.

Kenneth F. Clark, Price Adjustment Board, United States Maritime Commission, Room 512, 1200–15th St. NW., Washington, D. C.

E. Stanley Glines, Price Adjustment Board, United States Maritime Commission, Room 512, 1200–15th St. NW., Washington, D. C.

Victor B. Gerard, Price Adjustment Board, United States Maritime Commission, Room 512, 1200–15th St. NW., Washington, D. C.

Lt. Com. W. B. Van Houten, Price Adjustment Board, United States Maritime Commission, Room 512, 1200–15th St. NW., Washington, D. C.

Francis M. Shea, Assistant Attorney General, Department of Justice, Washington, D. C.

Edward M. Curran, United States Attorney, Court House, D Street between 4th and 5th Streets NW., Washington, D. C.

Bon Geaslin.

BON GEASLIN.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order

Filed March 15, 1945

On consideration of appellant's motion for leave to substitute Norman L. Burton, individually and as the successor in
57 office to Carmen G. Blough, as a party appellee herein, and to add as parties appellee herein the said Norman L. Burton, Kenneth F. Clark, Victor B. Gerard, W. B. Van Houten, and E. Stanley Glines, individually and as members of the Maritime Commission Price Adjustment Board, It is

Ordered by the Court that the said motion be, and it is hereby, granted.

PER CURIAM.

Dated March 15, 1945.

[File endorsement omitted.]

58 United States Court of Appeals, District of Columbia

No. 8862

WATERMAN STEAMSHIP CORPORATION, APPELLANT

v.

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia; Matthew F. McGuire, Associate Justice

Argued March 20, 1945.—Decided June 18, 1945

Mr. Bon Geaslin, with whom Mr. Allen J. Krouse was on the brief, for appellant.

Mr. Walker Lowry, Attorney, Department of Justice, of the Bar of the Supreme Court of California, pro hac vice, by special leave of court, with whom Assistant Attorney General Francis M. Shea and Messrs. Edward M. Curran, United States Attorney, Arnold Levy, Special Assistant to the Attorney General, and A. Morris Kobrick, Attorney, Department of Justice, were on the brief, for appellees.

Before GRONER, C. J., and MILLER and ARNOLD, JJ.

Opinion

GRONER, C. J.: This is an appeal by Waterman Steamship Corporation, plaintiff below, from a final judgment entered by the District Court dismissing Waterman's complaint for an injunction and declaratory judgment. Waterman is the owner and operator of a large fleet of ocean-going steam vessels, and on April 25, 1941, and on several dates subsequent thereto, chartered to British Ministry of War Transport, an agency of the British Government, certain of its vessels for the transportation of war goods from two United States Atlantic Coast ports to two ports of discharge in the Gulf of Aden and the Red Sea. The charter parties covering the several vessels were approved by the Maritime Commission in accordance with § 808 of the Shipping Act of 1916,[1] and were in all respects performed by Waterman, and the charter hire, except in respect to several small items of demurrage, paid to appellant on or before November 28, 1941.[2]

59 In November 1943, appellees, constituting the Price Adjustment Board of the Maritime Commission (hereinafter called "Commission"), purporting to act pursuant to the provisions of the Renegotiation Act,[3] served notice upon Waterman to appear before it on December 13, 1943, for the commencement

[1] Title 46 U. S. C., § 808: "Except as provided in section 1241 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, * * * any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, * * *."

[2] The Act, *infra* note 3, exempts from renegotiation all contracts for which payment was completed prior to April 28, 1942.

[3] U. S. C. Title 50, App. § 1911 [§ 403 of the 6th Supplemental National Defense Appropriation Act, 1942] provides that: "Whenever, in the opinion of the Secretary of a Department," excessive profits are realized "from a contract with such Department," the Secretary may require the contractor "to renegotiate the contract price." The 1943 Act adds to the above a provision authorizing review of the "amount" by the Tax Court and provides that the finding of the Tax Court as to the *amount* of excessive profits shall be final.

of renegotiation of the characters in question to determine whether Waterman had realized excessive profits.[4]

Waterman, pointing out that the charters were to a foreign government, denied that the Commission had any jurisdiction or authority in relation thereto, and declined to consent to renegotiation. The Commission, however, adhered to its position and insisted that the contracts should be construed to be between "*the vessel owner and the Maritime Commission*," [italics supplied] and hence that the Renegotiation Act was applicable.[5] Waterman, as a result of the impasse, brought this suit June 28, 1944, charging that there exists an actual and immediate controversy between the parties and that accordingly suit is brought for the purpose of enjoining enforcement of the Renegotiation Act as to Waterman's British contracts, and for a judgment declaring that the contracts are not subject to its provisions.

60

The Commission, without answering, moved to dismiss and the District Court granted the motion on the ground that Myers v. Bethlehem S. Corp., 303 U. S. 41, is controlling, i. e., that Waterman had not exhausted its administrative remedies.

On this appeal Waterman argues first, that the charters with the British Ministry were not charters with the Commission, or any "Department" of the United States Government, within the meaning of the Act, and accordingly that there is no law or statute which requires or authorizes their renegotiation; second, that final payment was made prior to April 28, 1942, and the charters are accordingly specifically exempted from the provi-

[4] The notice to Waterman, fixing the day of the commencement of renegotiation, was captioned as follows:

"Registered Mail—Return Receipt Requested.

Subject: Notice of Initial Conference under the Renegotiation Act which shall constitute Commencement of Renegotiation."

The language of this notice was in the precise language of the Renegotiation Act of 1943 (§ 403 (c) (2) (A)), which reads: "The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding." The body of the notice contained, *inter alia*, the information that "The renegotiation for your company has been assigned to the Commission's Price Adjustment Board," and the time fixed at 10:00 A. M. December 13, 1943, and requested a "detailed breakdown" of voyage revenue, expenses and other income received or expended in re the voyages of the vessels chartered to the British Ministry of War Transport, to the end that the Price Adjustment Board might determine "as to whether you have realized excessive profits, within the meaning of the Act."

[5] The position of the Commission, taken in response to Waterman's written protest that its charter contracts were not renegotiable, was contained in a reply signed by the Commission's General Counsel for "*Price Adjustment Board*," in which it was said:

"After considerable study of the entire Red Sea Operation, I am satisfied that there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable."

The letter concluded with a statement of the reasons for the opinion and called on Waterman to carry out the Commission's order to submit data to the end that renegotiation might be considered and completed.

The Maritime Commission's Administrative Order No. 64 (issued May 5, 1942) set up the Price Adjustment Board, and charged it with responsibility to bring about review of a contract as it might deem to be desirable, to renegotiate, or cause to be renegotiated, such contract prices when in its judgment such action might be necessary or desirable. The Administrative Order also authorized the Board to delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors.

sions of the Act; and third, that the charters were completed and terminated in a fiscal year which expired more than one year prior to the date on which appellees purported to commence renegotiation, and hence are excluded from renegotiation by the express provisions of the Act.

If the correctness of the judgment below depended upon answers to Waterman's points two and three, it might perhaps be affirmed, for the questions of the time of payment and completion of contracts may very well be matters as to which Congress has committed the answer primarily to the Commission.* But, in the view we take of the first point, we are of opinion that the District Court was wrong in holding against Waterman's legal right to a declaratory judgment on the jurisdictional question. For obviously, if there is no law compelling renegotiation of the contracts here in dispute, and if there is a real and substantial controversy, the question, as the Commission admits, in the present state of the pleadings, is jurisdictional and fundamental and Waterman is clearly entitled to invoke the Declaratory Judgment Act,† to the end that the controversy in that regard be settled promptly and without the loss and expense and delay which otherwise is inevitable.

Section 403 (c)‡ of the Renegotiation Act, on which the Commission relies, authorizes renegotiation of contracts made with "Departments" of the Government of the United States and provides that notice by registered mail to the contractor or subcontractor, shall constitute the commencement of the renegotiation proceeding. The word "Department" (as to whose contracts, alone, the Commission has jurisdiction) is defined as including "War Department, Navy Department, Treasury Department, Maritime Commission, War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively." There is not, and of course there cannot be, any claim that the Commission is authorized to reexamine or renegotiate a contract of a foreign government. And if it is a fact, as the complaint alleges—and as the motion to dismiss

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* With respect to Waterman's third argument, for example, the Act clearly requires an administrative determination in the first instance. Section 403 (c) (6) of the 1942 Act provides:

"No renegotiation of the contract price pursuant to any provision thereof, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, *as determined by the Secretary, occurs.*" [Italics supplied.] 50 U. S. C. Appendix 1191 (c) (6).

† 28 U. S. C., § 400. "Declaratory judgments authorized. * * * (1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such. * * *"

admits—that the contracts (charter parties) in issue were contracts with the British Government, it follows, of course, that the Commission, in undertaking to investigate profits, is exceeding its statutory powers.

Here, as we have seen, the complaint charges that Waterman, the owner of certain steamships, entered into the charter agreements with the British Ministry of War Transport, an agency of the British Government. And an inspection of a copy of a typical charter party—filed as an exhibit with the complaint—confirms this allegation, for it shows in express terms that it is an agreement "between Waterman Steamship Corporation Owners" and the "British Ministry of War Transport Charterers." And the only thing in the complaint which in any degree connects a Department of the United States Government in any way with the transaction is the statement in allegation 13, as follows:

"The plaintiff is informed and believes and therefore avers that the United States or a department or agency thereof entered into an arrangement, agreement or contract with the British Government or an agency thereof with respect to payments required to be made to the plaintiff by the British Ministry of War Transport, under the form of charter agreements entered into by the plaintiff with the British Ministry of War Transport. The details of said arrangement, agreement or contract are unknown to plaintiff, except as the same are set forth in a letter from the Office for Emergency Management, an agency of the United States, to the British Merchant Shipping Mission, dated the 9th day of June 1941, a copy of which letter is attached hereto and made a part of this complaint as though fully set forth herein, and marked Exhibit 'E'. The plaintiff was not a party to, nor was it consulted with respect to the arrangement, agreement or contract aforesaid, and took no part in the discussions or negotiations which led to its consummation."

Exhibit E, referred to, is a letter from the United States Office for Emergency Management to the British Merchant Shipping Mission, as follows:

"The following arrangement with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission shall be effected:

"A. The United States Maritime Commission will make the following payments required to be made to the owners or chartered owners by the British Ministry of War Transport under the terms of the charter:

62 1. Freight required to be paid under Clause 1 of the charter.

2. Demurrage, if any, required to be paid under Clause 11 of the charter.

3. Any increase in charter hire which may become payable under Clause 24 of the charter.

4. Loading and other expenses payable by the charterer under Clauses 4 and 5 of the charter.

B. The U. S. Maritime Commission shall receive any payments to be made by the owners or chartered owners pursuant to adjustment or reduction of charter hire under the charter which includes:

1. Refunds which may be made under Clause 4 of the charter.

2. Adjustments of freight which may be made under Clause 2 of the charter.

3. Net amounts which may become payable under Clause 25 and reductions in freight resulting from any reduction in insurance rates under Clause 24 of the charter.

The foregoing arrangement will be effective on vessels covered by requisition No. 1503A and on all future vessels which sail from U. S. loading ports to the Red Sea until further notice. It is understood, however, that such arrangement will be the subject of further discussion in connection with any changes which may be made in the near future in the charter arrangement.

"Sincerely yours,

(Signed) J. H. Burns,
Major General, U. S. Army."

Giving effect to all that is contained in this correspondence between a bureau of the United States and the British Shipping Mission, it shows no more than an understanding *between the two governments* that the United States would defray the expenses of the delivery from this country to ports on the Red Sea of war supplies to the British. And we may, perhaps, assume that the arrangement was under "Lend-Lease." Perhaps we may also assume that there were obstacles of an international nature which required the adoption of the method followed by the two governments, since at the time of the delivery the United States were not at war with Germany or Italy. But however that may be, it seems perfectly obvious that such an intergovernmental arrangement could have no effect upon Waterman's legal rights in the charters, and this is especially true in the light of the allegation of the complaint that as to the arrangement Waterman was not consulted and took no part in its consummation. The charter parties were, as we have seen, only between Waterman and the British Ministry, and all of the conditions for the benefit of the charterers were benefits running exclusively to the Ministry. It

alone, by the terms of the charters, was authorized to change the named ports of discharge, to make adjustments in charter hire and to receive funds where, under the provisions of the charters, such were payable. The Ministry had the right to cancel the charter party if there were failure in certain aspects of the agreement, and it alone, by the terms of the charters, was responsible for payment of demurrage. If, as claimed by the Commission, the charters were actually agreements between the United
63 States and Waterman, the provisions of the Shipping Act would not have required approval by the Maritime Commission, as it would have of contracts with an alien, and likewise the charter parties, to be legal, must have contained a provision to the effect that no member of or delegate to Congress would share in the profits,[8] and in addition the charters must have contained a provision against discrimination on account of race, color or national origin.[9] So that, at most, we have a case involving a written contract between an American corporation on the one hand and the British Government on the other, in which, for reasons of its own, the United States had assumed, as between itself and the British Government, to act as primary paymaster. Certainly there is nothing in this circumstance, without more, which would set at naught the well established legal principle that those who are parties to and bound by the contract are those who are shown by its terms to have contracted. They alone are bound by its provisions in the absence of a controlling statute.

Counsel for Waterman appropriately cite the case of United States v. Algoma Lbr. Co., 305 U. S. 415, as conclusive of this legal principle. There, in very definitely similar circumstances, the Supreme Court held that the United States, notwithstanding an interest in the subject matter of a contract, could not on that ground be subsituted in the place and stead of one of the parties to the contract and be required to assume that party's obligations. As to this the Court said:

"Neither the United States nor any officer purporting to act on its behalf is named a party to the contract. By its terms the contract is declared to be entered into 'between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part' and the Lumber Company, 'party of the second part.' It is thus upon its face the contract of the Klamath Indians executed by the Superintendent, acting as their agent. * * *

"Respondents point only to Sec. 7 of the Act of 1910 and the Regulations prescribed under it as compelling a different result.

[8] 41 U. S. C., 122.
[9] 6 Fed. Reg. 3109 (1941).

They argue that the requirements that the matter of sale be prescribed by the Secretary, that the contracts be executed by the Superintendent and approved by the Secretary, and that the prices of lumber be fixed by the Indian Commissioner, indicate a purpose to make the United States, acting as guardian or trustee of the Indians through the Secretary and Superintendent, the contracting party. But, as we have said, all that was done by the government officials in supervising the execution of the contracts and their performance was consistent with the exercise of its function as protector of the Indians without the assumption by the United States of any obligation to the purchasers of the timber, and no implied obligation on its part arises from the performance of that function."

Here, as we have pointed out, we have a simple contract of carriage by water, entered into by two responsible parties, each in its own behalf, and nothing more—except that the United States as the result of private arrangement with one of the parties, agreed to, and presumably did, pay the freight.

64 In this view enough has been said, we think, to indicate that in our opinion the complaint states a cause of action on which the District Court is empowered to enter a declaratory judgment. There is nothing in the Renegotiation Act which forbids it,[9] and it is difficult to see how the exercise of the right would improperly interfere with the statutory administrative plan. On the contrary, it would settle the jurisdictional question in the only forum in which it can be settled—at least at this stage of the case. If decided favorably to Waterman, it would completely end the controversy. If decided adversely to Waterman, it would leave the Commission and, if need be, the Tax Court, free to consider the merits. They alone are given jurisdiction to determine "what portion of the profits are excessive" within the meaning of the Act.

Certainly the power of a federal court, in a case of actual controversy involving no question of administrative discretion, to enter judgment declaratory of the rights of the parties is fundamental where no exclusive remedy is provided by statute—and likewise, even where a remedy of some sort is afforded, if it is not an adequate substitute and does not provide relief.[10] And that is

[9] "These remedies [habeas corpus, certiorari, mandamus, prohibition, and declaratory judgment] * * * are not limited to the cases in which the Constitution is deemed to require judicial review. On the contrary, even in cases in which Congress is competent to exclude judicial participation, these remedies are available on determination (1) that Congress has not forbidden judicial review, (2) that review would not improperly interfere with administration, and (3) that the issues presented are within the 'judicial power' to decide." Final Report, Attorney General's Committee on Administrative Procedure (1941) 81.

[10] That we have here a "controversy" is beyond any question (see footnotes 4 and 5). That it is subject to judicial decision is also clear, as is also that it is definite and concrete and is between parties having adverse legal interests. It is real and it is substantial. In like circumstances the Supreme Court has said the judicial function may be appropriately exercised, although the determination may not require the award of process or the payment of damages. Aetna Ins. Co. v. Haworth, 300 U. S. 227, 241.

certainly true in this case, for here, as the result of the District Court's disclaimer of jurisdiction, Waterman would be subjected to an expensive inquisitorial investigation. This might be followed by the sequestration of moneys due it by the United States on other contracts; and if these are insufficient in amount, it might then be confronted with an order, based on an ex parte determination, requiring it to repay a large sum of money—all in advance of a decision on the primary question, whether it is liable at all. To grant such a proposition would be contrary to the principles of expeditious justice.

We recognize the wrong of undue delay in judicial review in our opinion in Perkins v. Elg, 69 App. D. C. 175, 99 F. 2d 408. The question there was whether a citizen born in the United States who had been taken by her parents as a child to their former home in Sweden, where she remained until after she was twenty-one years of age, was entitled at that time, on her election, to retain American citizenship and to return to the United States as an American citizen. The State Department first answered the question in the affirmative and allowed her to return, but later concluded that the ruling was wrong, threatened her deportation and refused her an American passport, on the ground that because of her return with her father, a naturalized citizen of the United States, to Sweden, his former home, with the intention of not returning, she too had lost her American citizenship and had acquired Swedish nationality. She brought suit against the Secretary of State, Secretary of Labor and the Commissioner of Immigration for judgment declaring that she was a citizen of the United States, and for an injunction against the Secretary of Labor to prevent his carrying out his threat to deport her from the United States. We held that the District Court had jurisdiction to make the declaratory judgment and to enjoin the carrying out of the threat. We said:

"We think the facts we have outlined present a case fairly within the intent and purpose of the act whereby appellee may test the validity of the threat and have, as she is entitled to have, a declaratory judgment of her American citizenship. For we certainly have a case 'admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged,' and in these circumstances the Supreme Court has said the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617. * * * "[12]

[12] Cf. Ng Fung Ho v. White, 259 U. S. 276.

On appeal to the Supreme Court our opinion was affirmed, 307 U. S. 325. Here, as there, we have a dispute fundamental as to its nature, admitting of an immediate and definitive determination of the rights of the parties. To hold in such a case that the Declaratory Judgment statute is not available would be to destroy the purpose for which it was adopted. Indeed, if it were necessary, as it is not, we might go further and hold in the present state of facts that the District Court had jurisdiction without regard to the Declaratory Judgment Act to exercise its equity power to decide the question on which this case turns. See Shields v. Idaho Central Ry., 305 U. S. 177, Utah Fuel Co. v. Commissioner, 306 U. S. 56, and Great Northern Rwy. v. Merchants Elev. Co., 259 U. S. 285, 290. And the cases on which the Commission relies,[14] and

66 in which a review in equity was denied, were based upon the fact that there were adequate statutory remedies otherwise available. Here there is none, for the Renegotiation Act affords no opportunity, either before the Commission or the Tax Court or elsewhere, for an adequate determination of the jurisdictional question. And in such case Professor Borchard says, "it is a matter for judicial determination."[15] And to this he adds that "where administrative authority over a particular transaction or business is in dispute, and, the facts being established, the issue of jurisdiction is purely one of law, there is no reason why the courts cannot make a declaration, although in some of these cases an injunction would be refused."[16]

Accordingly, we refrain from concluding that a temporary injunction issue,[16] though the status quo may, in the discretion of the District Court, be maintained pending decision of the jurisdictional question. In such case, the District Court may, as a condition thereof, require appellant to execute and file an in-

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[14] Particular emphasis is placed upon the following four cases, which we think are distinguishable:

(1) California v. Latimer, 305 U. S. 255 (1938), held that an original bill in equity would not lie where the administrative tribunal's orders could only be enforced at law, at which time petitioner might then present its jurisdictional defenses.

(2) Federal Power Commission v. Edison Co., 304 U. S. 375 (1938), held that "mere preliminary or procedural orders are not within the statutes providing for *review by the Circuit Court of Appeals*." (Italics supplied.)

(3) Petroleum Exploration, Inc. v. Public Service Commission, 304 U. S. 209 (1938), held that the mere cost of preparing for a hearing is not sufficient cause to justify the interference by a *federal* court with a *state* administrative body cited.

(4) Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938), held that the statute had vested *exclusive* jurisdiction in the Circuit Court of Appeals to set aside, upon petition by an aggrieved party, any final order of the administrative body, and that the administrative remedies before the Board and the Court must first be exhausted before recourse could be had to a court of general equity jurisdiction.

Miles Laboratories v. Fed. Trade Comm., 78 U. S. App. D. C. 326, 140 F. 2d 883, is also cited by appellees. But there we dealt with a jurisdictional attack on an administrative body, from whose orders there existed an exclusive statutory right of appeal.

[15] Borchard, Declaratory Judgments (2d Ed. 1941) 878.

[16] *Ibid.*

[16] *Cf.* Interstate Natural Gas Co. v. La. Pub. Service Comm., 22 F. Supp. 50 (E. D. La. 1940) (preliminary injunction denied); 31 F. Supp. 980 (declaratory judgment granted); Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934). And see N. Y. Porto Rico S. S. Co. v. U. S., 32 F. Supp. 538, 116 F. 2d 709, revd. 36 F. Supp. 190.

demnity bond, with proper sureties, in such sum as will insure payment to the United States of any amount ultimately found to be due the United States, growing out of the contract or contracts involved in this litigation.

We therefore remand the case to the District Court for consideration of the single question: Were the charter agreements, entered into in 1941 by Waterman Steamship Corporation and the British Ministry of War Transport, contracts with a "Department" within the meaning of § 403 of the Renegotiation Act of 1942?

Reversed and remanded for proceedings in accordance with this opinion.

Dissenting opinion

ARNOLD, Associate Justice, dissenting: The majority opinion is in direct conflict with the well settled principle which this court affirmed in the case of Helco Products Co. v. McNutt,[1] as follows:

"The Supreme Court has said the pronouncements, policies, and programs of a government administrative agency do not give rise to a justiciable controversy, save as they have fruition in action of a definite and concrete character, constituting an actual or threatened interference with the rights of persons complaining. To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinons, wth a net loss of far greater proportions to the average citizen than any possible gain which could accrue."

67 It appears from the complaint and exhibits attached that the Chief Counsel of the Price Adjustment Board of the Maritime Commission has informed appellant that certain of its contracts are subject to the Renegotiation Act.[2] Appellant is in disagreement with the Chief Counsel. It has declined to discuss the matter with the Board or to give it any information. Instead it brings this action asking the court below to review the opinion of the Chief Counsel of the Board.

[1] 78 U. S. App. D. C. 71, 73-74, 137 F. (2d) 681 (1943). See also Miles Laboratories v. Fed. Trade Comm., 78 U. S. App. D. C. 326, 140 F. (2d) 683 (1944); Nat'l War Labor Bd. v. Montgomery Ward & Co., — U. S. App. D. C. —, 144 F. (2d) 528 (1944); cert. den., 65 Sup. Ct. 134.

[2] In this letter the Chief Counsel stated: "Pursuant to this direction, the Commission negotiated with the vessel owners. The vessels were made available, a charter party was signed with the British Ministry of War Transport for technical reasons but the Commission agreed to pay the vessel owner the agreed compensation for the use of the vessel. *This arrangement was evidenced by correspondence between the Commission and the vessel owner.* There appears to have been mutuality of understanding among all the parties interested, legality of consideration and definiteness as to terms, time of performance and acceptance. Payment was made in due course as agreed and this payment constitutes a part of the cost of the war to the people of the United States." [Italics supplied.]

The judgment of the court below dismissing the complaint is clearly correct. There is no case or controversy before the court. No administrative agency has made a decision of any kind which can be reviewed. The Price Adjustment Board before whom the appellant has been requested to appear has taken no action and made no recommendation.[4] But even if the Board had acted its decision would be only advisory. The Act authorizes the Chairman to delegate his authority by regulation. But he has done so only to a limited extent. He has given the Price Adjustment Board the authority only to make a preliminary determination of the proper contract price. No action to enforce that decision may be taken unless the Chairman by his order follows the recommendation of the Board.[5]

No right of appellant is prejudiced by the dismissal of this premature complaint. If the Chairman of the Commission unlawfully determines to withhold any sums due to appellant, appellant has its remedy by a suit on the contract. If the Chairman of the Commission decides to sue appellant for excess profits appellant may defend on the ground that the Chairman acted beyond his statutory authority. If the Chairman decides to compel appellant to furnish information on these contracts he must use a subpoena which can only be enforced by court proceedings in which appellant may make this same defense.[6]

68 Appellant's claim that it may be subject to criminal prosecution is equally insubstantial. A criminal prosecution requires first a formal order issued by the Chairman, second a wilful failure to comply with it.[7] No such order has been issued or threatened. Even if such order had been issued a court of equity would not interfere. Failure to obey the order based on a reasonable belief it was unlawful would not subject appellant to penalty for wilful disobedience.[8]

The effect of the majority's decision will be to permit any party who is asked to renegotiate a contract to bring an immediate suit in court by alleging that his particular contract is not subject to

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[3] Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938). This court stated in Doehler Metal Furn. Co. v. Warren, 76 U. S. App. D. C. 60, 62, 129 F. (2d) 43, 45, (1942): "The declaratory judgment Act, however, does not increase the jurisdiction of the federal courts, in the sense that, if a court has not had power over certain subject matter or over certain persons, the declaratory judgment Statute does not give it."

[4] The official notice of the Board concerning an initial conference contains the following:

"You are at liberty the initial conference to submit reasons why you cannot furnish the information within the requested period *as well as to state reasons why you are not subject to renegotiation.*" [Italics supplied.]

[5] Renegotiation Act of 1942, 56 Stat. 982, § 403 (f).

[6] Administrative Order No. 64.

[7] Cf. Elliott v. American Mfg. Co., 138 F. (2d) 678, 679 (C. C. A. 5th, 1943).

[8] The only request for information comes from the Price Adjustment Board. The Act requires as a basis for criminal prosecution an order from the Secretary of the Department involved which in this case means the Chairman of the Maritime Commission. See Sections 403 (e) and 403 (a) (2), *supra*, note 5.

[9] California v. Latimer, 305 U. S. 255, 260, 261 (1938).

the Act. On the filing of such a bill the renegotiation conferences must stop while the District Court makes an initial determination of the jurisdiction of the administrative agency.[10] It is naive to think that this device will not be used for purposes of delay.

Nothing in the Act or in the principles of orderly administrative procedure justifies intermeddling by this court in the complex business of renegotiation in absence of an order affecting appellant's rights.

69 In United States Court of Appeals for the District of Columbia

No. 8862—April Term, 1945

WATERMAN STEAMSHIP CORPORATION, APPELLANT

vs.

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., APPELLEES

Appeal From the District Court of the United States for the District of Columbia

Judgment

Filed June 18, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for proceedings in accordance with the opinion of this Court.

Per Mr. Chief Justice GRONER.

Dated June 18, 1945.

Dissenting opinion by Mr. Justice ARNOLD.

[10] Compare the language in Great Lakes D. & D. Co. v. Huffman, 319 U. S. 293, 299 (1943):

"It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy, or collection of any tax' imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that that procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended."

In the United States Court of Appeals for the District of Columbia

[Title omitted.]

70 *Designation of record*

Filed Aug. 27, 1945

The Clerk will please prepare a certified transcript of application to the Supreme Court of the United States for certiorari in the above-entitled case, including therein the following:

1. The printed record which appears in the form of a joint appendix to appellant's brief.
2. Appellant's motion for leave to substitute party appellee and to add parties appellees.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Harold Judson,
HAROLD JUDSON,
Acting Solicitor General.
A. Morris Kobrick,
A. MORRIS KOBRICK,
Attorneys for Appellees.

Service of designation of record acknowledged this 27th day of August 1945.

BOS GEASLIN,
Counsel for Appellant.
By G. BLOOD.

United States Court of Appeals for the District of Columbia

Clerk's certificate

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 91, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for Appellees in the case of: Waterman Steamship Corporation, appellant vs. Emory S. Land, Individually and as Chairman of the United States Maritime Commission, et al., Appellees, No. 8862, April Term, 1945, as the same remain upon the files and records of said Court of Appeals.

71 In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this thirtieth day of August A. D. 1945.

[SEAL] JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

72 Supreme Court of the United States

Order allowing certiorari

Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

73 Supreme Court of the United States

Stipulation as to record

Filed Nov. 10, 1945

Subject to this Court's approval, it is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the hearing on Writ of Certiorari, the printed record shall consist of the printed record on Petition for Writ of Certiorari.

It is further stipulated and agreed that either of the parties hereto may refer in their briefs and argument to the original record filed in the Supreme Court of the United States, which has not been printed.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

Dated this 9th day of November 1945.

Bon Geaslin,
BON GEASLIN,
Counsel for Respondent.

Dated this 9th day of November 1945.

[File endorsement omitted.]

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No. 486

Supreme Court of the United States

October Term, 1945

...INEVITABLE AND AS CHAIRMAN
... MARITIME COMMISSION,

...

...

... OF CERTIORARI TO THE UNITED
... APPEALS FOR THE DISTRICT OF

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 435

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., PETITIONERS

v.

WATERMAN STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Emory S. Land, Chairman of the United States Maritime Commission, Thomas M. Woodward, Chairman of the Price Adjustment Board of the Maritime Commission, and A. G. Rydstrom, John R. Paull, Norman L. Burton, Kenneth F. Clark, Victor B. Gerard, W. E. Van Houton, and E. Stanley Clines, members of said Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on June 18, 1945.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R.

51) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 58–68) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1945 (R. 69). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a United States District Court has jurisdiction to entertain a declaratory judgment action by a steamship company against the Chairman of the Maritime Commission and the Commission's Price Adjustment Board, to establish that certain contracts of the company are not subject to the Renegotiation Act, where the Board has merely notified the company of a renegotiation conference and requested certain information, and where no order has been issued determining that the contracts are subject to the Act, or that excessive profits have been realized thereunder.

2. If so, whether the court should refuse to exercise such jurisdiction, as a matter of discretion.

STATUTE INVOLVED

The relevant portions of the Renegotiation Act are set forth in a separate pamphlet (Appendix C)

filed with this petition, and entitled "The Renegotiation Act."

STATEMENT

On June 27, 1944, respondent, Waterman Steamship Corporation, filed a complaint in the District Court of the United States for the District of Columbia, against the Chairman of the United States Maritime Commission and the members of the Maritime Commission Price Adjustment Board, seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act, and requesting that renegotiation proceedings with respect to such contracts be enjoined (R. 2–48).[1]

[1] Unless otherwise specified, the provisions of the Renegotiation Act referred to in this petition are those in effect immediately prior to enactment of the Revenue Act of 1943 (Pub. L. No. 235, 78th Cong., 2d Sess. (February 25, 1944)). The original Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, April 28, 1942, 56 Stat. 226, and was amended by the Revenue Act of 1942, October 21, 1942, 56 Stat. 798, the Military Appropriation Act, 1944, July 1, 1943, 57 Stat. 347, the Act of July 14, 1943, 57 Stat. 564, and the Revenue Act of 1943, *supra*, the last of which supplied the title "Renegotiation Act." With certain exceptions, particularly with respect to the Tax Court remedy, the amendments in the Revenue Act of 1943 were made effective only with respect to fiscal years ending after June 30, 1943. (See Sec. 701 (d) of the Revenue Act of 1943.) The pertinent provisions of these statutes are collected in Appendix C, separately printed.

The facts as alleged in the complaint, and as shown by the documents referred to therein, may be summarized as follows:

Respondent owns and operates a large fleet of ocean-going merchant vessels. On and after April 25, 1941, respondent entered into a number of charter parties (the "Red Sea Charters") in form with the British Ministry of War Transport, an agency of the British Government, whereby twelve steamships were chartered to the latter for the transportation of war goods from the United States to ports on the Gulf of Aden and the Red Sea (R. 4–6, 18).[2] By agreement between the British and American Governments, the Maritime Commission undertook to make the payments to respondent which the British Ministry of War Transport was required to make under these charters (R. 6–7, 28). The charters were performed by respondent, and the charter hire, with the exception of certain demurrage items, was paid to respondent on or before November 28, 1941 (R. 7, 41).

On November 26, 1943, petitioner John R. Paull, a member of the Maritime Commission Price Adjustment Board, wrote to respondent stating that

[2] The charter parties were approved by the Maritime Commission in accordance with Section 9 of the Shipping Act of 1916 (39 Stat. 730, 46 U. S. C. 808) making unlawful, without the approval of the Commission, the chartering of any vessel owned by a citizen of the United States to any non-citizen.

"renegotiation for your company has been assigned" to the Board, whose function is "to review the profits realized * * * under contracts * * * subject to renegotiation" under the Renegotiation Act and "to arrive at a settlement of the amount of excess profits, if any, realized under the Act by the contractor * * *" (R. 29–30). The letter invited respondent to an initial conference with the Board (set for December 13, 1943, but subject to continuance at respondent's request, R. 30), and requested that at such conference respondent supply certain information relating to its income and expenses during 1941 and 1942, divided between government and commercial business and showing separately operations under the Red Sea Charters (R. 30–31). The letter explained that at the conference, respondent would be free to state reasons, if any, why it was unable to furnish the information requested or why it was not "subject to renegotiation" (R. 31). The letter concluded by saying that it was anticipated that upon the basis of the requested information, "a mutually satisfactory determination can be made as to whether you have realized excessive profits, within the meaning of the Act" (R. 32).[3]

[3] The Renegotiation Act authorizes the heads of war agencies, including the Chairman of the Maritime Commission, to determine whether excessive profits have been realized under war contracts and subcontracts and to take steps to eliminate those profits. (Secs. 403 (a) and (c); see Appen-

On December 13, 1943, respondent replied to Mr. Paull, acknowledging that some of its other contracts with government agencies might be subject to renegotiation and suggesting a conference with respect to such contracts, but denying that the Red Sea Charters were subject to the Renegotiation Act, for the following reasons: (a) the charters were not entered into with any "Department" within the meaning of the Act, since they named the British Ministry of War Transport rather than the Maritime Commission; (b) final payment on the charters had been made prior to April 28, 1942 (although it was recognized that certain demurrage claims against the Commission under the charters were still outstanding); and (c) renegotiation was begun more than one year after the close of respondent's fiscal year within which the charter operations were completed (R. 39–42).[4]

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dix C pp. 6, 8–9.) The Chairman of the Maritime Commission has delegated to the Price Adjustment Board of the Commission authority to review profits on war contracts for the purpose of reaching an agreement with the contractor as to the extent to which, if at all, such profits are excessive. In the absence of agreement with the contractor the Board makes a recommendation to the Commission Chairman, who, if he finds that excessive profits have been realized, makes a determination as to their amount and takes steps for their elimination. (See Appendix B, *infra*, pp. 24–26.)

[4] The Act applies only to contracts with war agencies, including the Maritime Commission, on which final payment had not been made prior to April 28, 1942. Renegotiation

On May 23, 1944, petitioner Kenneth F. Clark, counsel for the Board,[5] wrote to respondent's counsel, expressing the opinion that "there was in each case [pertaining to the Red Sea operation] a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable", and suggesting that a conference be held on June 29, 1944 "for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act" (R. 8–9, 44). The letter stated that although for "technical reasons" the charters had been made with the British Ministry of War Transport, the Maritime Commission had conducted the negotiations with the vessel owners and had agreed to pay and had paid the charter hire to them; and that this arrangement "was evidenced by correspondence between the Commission and the vessel owner" which resulted in "renegotiable agreement with the Commission" (R. 43–44).

Respondent did not reply to the letter or attend the conference on June 29, 1944, but instead filed

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must be started within "one year after the close of the fiscal year of the contractor * * * within which completion * * * of the contract * * * as determined by the [head of the agency] occurs." (See Appendix C, pp. 11–12, 16–17.)

[5] Mr. Clark was not then a member of the Board. He was later appointed a member, and after this proceeding had reached the court below, he was made a party, upon motion of respondent (R. 53–57).

its complaint on June 27, 1944, praying that petitioners be enjoined from requiring respondent to furnish information, from enforcing the Renegotiation Act with respect to the Red Sea Charters, and from initiating criminal proceedings because of respondent's failure to supply information (R. 13–14). The complaint further prayed for a declaratory judgment that the Red Sea Charters are not subject to renegotiation, and that no information with respect thereto can lawfully be required of respondent (R. 14–15).

Petitioners moved to dismiss the complaint on the grounds that the court had no jurisdiction over the subject matter, that the complaint failed to show any injury to respondent, and that respondent had not exhausted its administrative remedies (R. 50–51). The District Court, pointing out that no administrative order had been issued, dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (R. 51–52).[6] On appeal, the court below reversed, one Judge dissenting, and remanded the case to the District Court "for consideration of the single question" whether the Red Sea Charters were "contracts with a 'Department' within the meaning of § 403 of the Renegotiation Act of 1942." The judgment of reversal permitted the District Court, in its discretion, to

[6] The court also denied respondent's motion for a preliminary injunction (R. 48–51).

maintain the *status quo* pending decision of the jurisdictional question, and to require respondent to file a bond insuring "payment to the United States of any amount ultimately found to be due" (R. 66).[7]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the District Court had jurisdiction in the circumstances of this case to determine by declaratory judgment whether the Red Sea Charters were contracts with a "Department" within the meaning of the Renegotiation Act.

2. In holding that such jurisdiction, if it existed, should be exercised.

3. In holding that the motion to dismiss the complaint admitted that the Red Sea Charters were not subject to the Renegotiation Act.

4. In failing to hold that the action was premature in that respondent had not sustained and was in no imminent danger of sustaining any legal injury.

5. In failing to hold that respondent should have exhausted its administrative remedies before seeking judicial relief.

6. In ruling that the District Court may, by injunction, maintain the *status quo* pending decision of the jurisdictional question.

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[7] As yet, respondent has not sought a temporary injunction in the District Court.

7. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case presents a question of considerable importance to the administration of the Renegotiation Act, designed to control excessive profits under Government wartime contracts. The central issue is whether at the very outset of the renegotiation proceeding, before any administrative determination as to excess profits or any final order for their elimination has been made, the district court may intervene to decide that some of the contracts involved are not subject to renegotiation—an issue which Congress entrusted to the administrative authorities.

The court below divided on this question, but the majority answered it in the affirmative, and, we submit, incorrectly. The court thereby has made available to war contractors a means of effectively halting renegotiation proceedings at the threshold for substantial periods of time whenever a question as to coverage is raised, even though that question, if left to administrative disposition, might be decided for the contractor or might become academic through a determination that there were no excess profits. The six additional cases now pending in the District Court for the District of Columbia presenting the very "coverage" question here involved,[8] as

[8] *American Export Lines, Inc.* v. *Land et al.*, Civil No. 29802; *California Eastern Line, Inc.* v. *Land et al.*, Civil No. 29936; *Isthmian Steamship Co., Inc.* v. *Land et al.*, Civil No. 29546; *Pacific Atlantic Steamboat Co.* v. *Land et al.*, Civil

well as the large percentage of contested renegotiation proceedings in which this and other "coverage" questions arise, demonstrate that the interruption to the renegotiation program may be substantial, and underline the need for a definite determination by this Court."

Apart from the renegotiation program, a decision of the question at hand has an important bearing upon the application of the Federal Declaratory Judgments Act to what could be termed "'jurisdictional" issues under consideration by an administrative body. Cf. *Miles Laboratories* v. *Federal Trade Commission*, 140 F. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752.

2. The decision below is in contravention of established principles of judicial administration. The judicial intervention into the administrative process, sanctioned by the ruling below, runs

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No. 29937; *States Steamship Co.* v. *Land et al.*, Civil No. 29938; *Luckenback Steamship Co., Inc.* v. *Land et al.*, Civil No. 28540.

[9] As the dissenting judge below pointed out (R. 68):

"The effect of the majority's decision will be to permit any party who is asked to renegotiate a contract to bring an immediate suit in court by alleging that his particular contract is not subject to the Act. On the filing of such a bill the renegotiation conferences must stop while the District Court makes an initial determination of the jurisdiction of the administrative agency."

Of some 200 renegotiation cases now pending in the Tax Court, approximately 130 (about 65%) raise an issue of coverage. Of these, some 110 cases (or about 55% of the total) raise issues of coverage other than those which the court below indicated (R. 60) might not be the subject of declaratory relief. See also Appendices A and B, *infra*, pp. 21–26.

counter to this Court's decisions deferring access to the courts until the authorized administrative task is completed. It is also inconsistent with the Congressional intention that issues such as that raised here should be decided exclusively in the Tax Court.

a. *Judicial intervention at this stage of the renegotiation proceeding is premature.*—The allegations of the complaint show that respondent has merely been requested to present certain information at an initial renegotiation conference, and has been notified of the opinion of the Board's counsel that certain of respondent's contracts are renegotiable. The Board has not determined that these contracts are subject to the Act,[10] or that any "excessive profits" have been realized under these or any other contracts of respondent. Even if the Board should ultimately decide both questions against respondent, such decision would merely be advisory to the Chairman of the Commission, who alone has authority to issue the final renegotiation order.[11]

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[10] The letter of May 23, 1944, from the Board's counsel to respondent's counsel (R. 43–44), merely recited the former's opinion (see R. 54) that respondent's arrangement with the Maritime Commission resulted in agreements subject to the Act, and was manifestly intended to show that there was a reasonable basis for holding an initial renegotiation conference. Nothing in the letter altered the invitation to respondent "to state reasons why you are not subject to renegotiation", contained in the original notice of November 26, 1943 (R. 31).

[11] See Appendix B, *infra*, pp. 24–30. The allegations in the complaint that petitioners "intend to and will" make "a

By granting a declaratory judgment at a preliminary stage of the administrative process, the court below ignored the well settled bar to the exercise of such jurisdiction—the absence of an actual or an immediately threatened invasion of legal rights.[12] It equally ignored the principle that the Declaratory Judgments Act does not authorize the Federal courts to issue "an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 324.[13]

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unilateral determination of alleged excess profits under the charter agreements" and "unlawfully withhold amounts due [respondent] from the United States" (R. 10) are "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528, 530 (App. D. C.), certiorari denied, 323 U. S. 774.

[12] *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *Employers Group, etc.* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 735; *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. C. A. 5), certiorari denied June 18, 1945; *National War Labor Board* v. *United States Gypsum Co.*, 145 F. 2d 97 (App. D. C.), certiorari denied March 12, 1945. The "extensive inquisitorial investigation" thought by the court below to justify declaratory relief involves at most "expense and annoyance" which is "'part of the social burden of living under government'" and "not the sort of irreparable injury against which equity protects." *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 222, 221.

[13] See also *Maryland Casualty Co.* v. *Pacific Co.*, 312 U. S. 270, 273; *Helco Products Co.* v. *McNutt*, 137 F. 2d 681 (App. D. C.); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324–325.

No actual or threatened legal injury is to be derived from respondent's allegation (R. 11) that it will be subject to the penal sanctions of the Act for failure to supply the requested information. Even if the "request" of the Board for information (R. 29–32, 39–42) can be deemed a "demand" by the Chairman, "wilful" disregard of which is made punishable (Section 403 (c) of the Act), a court of equity will not on that account interfere where a refusal to comply is "based on an honest belief that the Act is not applicable." *California* v. *Latimer*, 305 U. S. 255, 260–261; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 387. Moreover, under Title XIII of the Second War Powers Act (56 Stat. 185), made applicable by Section 403 (d) of the Renegotiation Act, authority is given to invoke the aid of federal courts to compel obedience to subpoenas; and even where judicial proceedings are thus instituted by the Government, the defendants could not obtain an original determination by the court of the question of coverage. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501.

b. *Relief in the Courts is Barred by Respondent's Failure to Avail Itself of the Statutory Procedure Provided by Congress for the Review of Renegotiation Proceedings.*—Section 403 (c) (2) of the Act, as amended by the Revenue Act of 1943, allowing any contractor "aggrieved by a determination of the Secretary * * * as to the existence of excessive profits * * * [to]

file a petition with the Tax Court of the United States for a redetermination thereof", expressly provides (Sec. 403 (c) (1)) that "Upon such filing such court shall have *exclusive jurisdiction*, by order, to finally determine the amount, if any, of such excessive profits * * *" (Italics supplied; see Appendix C, pp. 38–39, 37). Jurisdiction in the Tax Court was not only clearly intended to be exclusive,[14] but was intended by Congress to extend to "all questions of fact and law" (90 Cong. Rec. 1355).[15]

[14] The Tax Court remedy was added to the Renegotiation Act after its original enactment, to resolve the prevailing doubt as to the right of appeal to the courts (89 Cong. Rec. 9936), and the intention to confer "exclusive" jurisdiction upon the Court was repeatedly emphasized in the Committee Report (H. Rept. No. 871, 78th Cong., 1st Sess., pp. 76, 77, 84, 85). A recommendation by the House Naval Affairs Committee that the District Courts be given jurisdiction to review renegotiation determinations was rejected (H. Rep. 733, 78th Cong., 1st Sess., Investigation of the Progress of the War Effort, Report of the House Committee on Naval Affairs, pursuant to H. Res. 30, 78th Cong., 1st Sess., p. 34; 90 Cong. Rec. p. 1357), and instead a single forum, the Tax Court, was selected to assure, among other things, uniformity of decision and use of the Tax Court's expertness in profit questions (89 Cong. Rec. 9929).

[15] The authorization to the Tax Court to redetermine the "amount" of excessive profits necessarily includes questions concerning its jurisdiction to make such redetermination, including questions as to the "coverage" or application of the Act. Neither the Act nor its legislative history suggests that any special category of legal issues raised by the petition in the Tax Court was to be excluded from consideration by the Tax Court. Contractors seeking redress in the Tax Court have apparently assumed that all issues may there be decided. See p. 11, *supra*, n. 9.

In holding a declaratory judgment to be available although respondent has failed to resort to the Board, the Chairman, or the Tax Court, the court below disregarded "the long settled rule of judicial administration" requiring exhaustion of administrative remedies and the utilization of the judicial forum provided by Congress.[16] That such unprecedented intervention by a court can seriously interfere with sound administration is graphically illustrated in the instant case. The question which the court below directed the District Court to dispose of (whether the Red Sea Charters constituted "contracts with a 'Department'" within the meaning of the Act) was only one of three questions raised by respondent as objections to the application of the Act. That issue, far from being purely one of law, as the court below supposed (R. 60), involves a mixed question of law and fact of considerable complexity, requiring inquiry into the dealings and arrangements between the Commission and the respondent (see R. 8–9, 43). The hearing and determination of this question by the Chairman of the Commission and later by the Tax

[16] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. Cf. *California* v. *Latimer*, 305 U. S. 255; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209; *Newport News Company* v. *Schauffler*, 303 U. S. 54; *Natural Gas Pipeline Company* v. *Slattery*, 302 U. S. 300.

Court *de novo* on review[17] may involve presentation and consideration of the same data as would be pertinent to the other two issues of "coverage" raised by respondent in the court below—whether final payment under the contracts had been made prior to April 28, 1942, and whether they had been completed in a fiscal year expiring more than one year prior to the commencement of renegotiation proceedings. Yet the court below thought it proper to separate the first question from the others; and while conceding that the latter two may very well be matters "as to which Congress has committed the answer primarily to the Commission," it held that the first question was "jurisdictional and fundamental" and susceptible of resolution by declaratory judgment (R. 60). Such selection of one of several issues which an administrative agency would be required to consider before making a determination which Congress has explicitly entrusted to it, violates the sound precepts which stay the judicial hand until the entire administrative process is at an end (cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507–508). This is especially true since the Commission, in order to perform its "function * * * must draw inferences and make findings from the same conflicting materials" that the court below con-

[17] Since respondent appears to agree that certain of its contracts other than the Red Sea Charters are subject to the Act (R. 41), its standing as a "contractor" to seek review of renegotiation in the Tax Court would seem assured.

sidered in "anticipating and foreclosing" the administrative conclusion (see *Endicott Johnson Corp.* v. *Perkins, supra,* at 509).

c. *Apart from any Question of Jurisdiction to Entertain the Instant Suit, the Exercise of a Sound Discretion by the District Court Justified, if it did not Require, the Denial of a Declaratory Judgment.*—Ample warrant for the district court's decision to withhold declaratory relief is found not only in the essential prematurity of this action but in the danger of unduly delaying and interfering with the orderly administration of "the complex business of renegotiation" (R. 68). "Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the [declaratory] relief prayed, upon equitable grounds." *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 300; see also *Alabama State Federation of Labor, Local Union No. 103* v. *McAdory,* October Term, 1944, No. 588, decided June 11, 1945; *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491, 494.

Questions of "coverage" are constantly arising in the day to day administration of the Renegotiation Act, since the Act is replete with exceptions and exemptions affecting the "jurisdiction" of the renegotiation authorities. See *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Pur-*

poses, Principles and Interpretations, under the Renegotiation Act (March 31, 1943) pp. 9–16; see also p. 11, *supra*, n. 9, and Appendix A, *infra*, pp. 21–23. Hence, the attempt by a district court to resolve "coverage" issues at the outset of the renegotiation proceedings would threaten serious delay in the administration of the Act. Moreover, a renegotiation proceeding with respect to any one company normally extends to *all* of the company's contractual operations for a particular fiscal period,[18] so that the delay ensuing from a declaratory judgment action would affect not merely the contracts giving rise to the particular controversy but all the contracts involved in that renegotiation proceeding. And, as the dissent below noted, "it is naive to think that this device [the declaratory judgment suit] will not be used for purposes of delay" (R. 68).

In these circumstances, the directions of the court below to the district court to exercise jurisdiction would seem at the very least to constitute an abuse of discretion. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer". *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf.

[18] See Blough, *Renegotiation Standards and Practices* (1943), 10 Law and Contemp. Problems 276, at 277.

Harrisonville v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

SEPTEMBER 1945.

APPENDIX A

WAR CONTRACTS PRICE ADJUSTMENT BOARD
Washington 25, D. C., 12 September 1945.

Room 3D 573, The Pentagon,

ACTING SOLICITOR GENERAL,
Washington, D. C.

DEAR MR. JUDSON: At the request of your representatives I am submitting the following information relating to operations of renegotiation agencies under the Renegotiation Act. I am the general counsel of the War Contracts Price Adjustment Board and also legal adviser to the Chairman of the War Department Price Adjustment Board. While I am more familiar with particular cases that have been handled to conclusion by the War Department than by any of the several "Departments" as defined in the Act, nevertheless, I am generally familiar with the operations of those Departments. Based upon the experience of renegotiation agencies I can say that in a substantial proportion of all renegotiation proceedings questions arise as to whether the Act is applicable to the particular contractor or subcontractor or to receipts or accruals under one or more of the contracts or subcontracts involved in the proceedings. Of course in cases in which an agreement is entered with the contractor the issues are settled to the satisfaction of both

the Government and the contractor. These questions include, among others, the following:

(1) Whether certain of the receipts or accruals involved have been received or accrued under contracts with a "Department" within the meaning of the Act, or under subcontracts as defined in the Act.

(2) Whether final payment under certain of the contracts or subcontracts involved was made prior to April 28, 1942.

(3) Whether renegotiation proceedings were commenced within the time provided in the Act within which such proceedings must be commenced.

(4) Whether the aggregate of the amounts received or accrued in the contractor's fiscal year under the contracts or subcontracts to which the Act is applicable are under the fiscal year minimum provided in the Act.

The Renegotiation Act contains a termination date and is made applicable only to profits derived from contracts and subcontracts which are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date. In addition to the matters listed specifically above, it is to be expected that in certain of the cases handled by the renegotiation agencies, the contractor will differ with the renegotiation representatives as to the profits reasonably allocable to performance prior to the termination date.

Subject to the regulations of the War Contracts Price Adjustment Board, to the power of that Board to review unilateral determinations issued under delegated authority and to the power of

the Tax Court to redetermine excessive profits de novo, each Department in the administration of the Act determines questions of the applicability of the Act in issuing unilateral determinations under authority delegated by that Board.

Very truly yours,

W. W. Watts,
W. W. Watts,
Lt. Colonel, A. U. S.
General Counsel.

APPENDIX B

UNITED STATES MARITIME COMMISSION,
Washington, September 11, 1945.

THE ACTING SOLICITOR GENERAL,
Washington 25, D. C.

DEAR MR. JUDSON: At the request of your representatives, I am submitting the following information concerning the authority, practice and procedure of the United States Maritime Commission Price Adjustment Board.

Section 403 (f) of the Renegotiation Act of 1942 (Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942) provides that "Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, * * * and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

Pursuant to that provision, the Chairman of the United States Maritime Commission (who under subsection (a) of the Act is a "Secretary" of a "Department") delegated certain powers to the Price Adjustment Board by Administrative Orders establishing and defining the authority of

the Board. Copies of these Administrative Orders are enclosed and made a part of this letter by reference.

Under the authority vested in the Board by these Administrative Orders, it has been the uniform practice of the Board to arrange a conference with the contractor after obtaining information and data, which after being analyzed indicate that "excessive profits" within the meaning of the Act may have been realized by the contractor from contracts with the United States or subcontracts thereunder, as defined in Section 403 of the Act. In the conference the Board attempts to reach an agreement with the contractor as to the extent to which, if at all, profits realized under such contract are excessive, and as to a satisfactory method for eliminating any "excessive profits." If no agreement with the contractor is reached, the Board makes a recommendation in Memorandum form to the Chairman of the Commission that he formally find that "excessive profits" have been realized in the amount believed by the Board to be excessive. In order that the Chairman of the Commission may reach an independent decision in the matter, the Board recites in the Memorandum all of the salient facts and financial data, as well as all other important considerations, upon which its recommendation is based. If any question is raised as to whether the Act applies to the particular contractor or to any of his contracts under review, the Board obtains an opinion from the Legal Division of the Commission, and uniformly makes reference, in the same Memorandum, to

such questions as well. These include such matters as whether a contract was with a "Department" within the meaning of the Act, whether final payment under the contract was made prior to April 28, 1942, whether the contract was completed or terminated in a fiscal year which closed more than one year before renegotiation proceedings were commenced, and similar questions as to application of the Act to the particular person or contract. It is also the Board's practice to draft and submit with its recommendation to the Chairman of the Commission, a proposed "unilateral order" for the Chairman's signature. If the recommendations and proposed order submitted by the Board are approved by the Chairman, the order is signed by him and issued as a unilateral order.

The Board, since its inception, has never issued, or asserted the authority to issue, a unilateral order on its own authority, and the Board has at no time understood the Administrative Orders referred to above as authorizing the Board to do more than to make recommendations to the Chairman of the Commission.

Sincerely,

John R. Paull,
JOHN R. PAULL,
Vice Chairman,
Price Adjustment Board.

Enclosures.

UNITED STATES MARITIME COMMISSION

WASHINGTON

Administrative Order No. 64

To All Employees of the United States Maritime Commission:

For the purposes of carrying out the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, insofar as relates to renegotiation of contracts and subcontracts thereunder and for related purposes, there is hereby created a Board to be known as the "Price Adjustment Board of the Maritime Commission."

The Board shall consist of a Commissioner of the Maritime Commission to be designated by the Chairman of the Commission, a representative of the Division of Finance to be designated by the Director of Finance with the approval of the Maritime Commission, and a third member who shall be selected with the approval of the Chairman of the War Production Board as his representative. Additional members of the Board shall be appointed by the Commission from time to time should it appear advisable. The Commission members shall act as Chairman of the Price Adjustment Board.

The Board is hereby charged with responsibility for bringing about such review of contract and subcontract prices as it may deem to be desirable, renegotiating, or causing to be renegotiated, such contract prices when, in its judgment, such action is necessary or desirable, and making such rec-

ommendations to the Commission as may be appropriate to effectuate the results of such renegotiations.

The Board is also instructed whenever appropriate to function jointly with representatives or agencies of the Navy Department, the War Department, the War Production Board, and other Departments or Agencies of the Government.

To that end, the Board shall have the collaboration of the Commission's Purchase and Supply, Production, Finance, and Legal Divisions, and of such other officers and divisions of the Commission as may be appropriate, and in cases where it appears that costs or profits of contractors or subcontractors are, or may be excessive for any reason, shall initiate and be responsible for suitable action with a view to securing adjustments and refunds. The Board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Commission or by the Chairman of the Commission. The Construction Review and Analysis Section of the Division of Finance, in conjunction with the General Auditor of Construction, will act as fact-finding agency for the Price Adjustment Board, and will, upon the request of the Price Adjustment Board, conduct, or cause to be conducted, investigations into the cost and profits of any contracts or subcontracts in which the Commission is interested.

The Price Adjustment Board, the Construction Review and Analysis Section and the Commission's General Auditor of Construction are authorized to make use of the facilities of the Securities and Exchange Commission, Federal Trade

Commission, and other proper departments or agencies of the Government in securing and assembling information.

The Price Adjustment Board is also authorized to call upon the Cost Analysis Section of the War Production Board to conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, and through the Secretary of the Commission may request the Bureau of Internal Revenue to make available its services, with the approval of the Secretary of the Treasury, for the purpose of making examinations and determinations with respect to profits under such contracts or subcontracts. No audit shall be made pursuant to Executive Order No. 9127 without first advising the Cost Analysis Section of the War Production Board. This provision, however, does not apply to audits made in the normal course of the Commission's business otherwise than pursuant to such Executive Order.

All cost analysis reports and all information obtained from contractors, or otherwise by or for the Price Adjustment Board of the Maritime Commission, shall be available at all times to the corresponding Price Adjustment Boards of the War and Navy Departments and to the War Production Board.

Where contractors have contracts with either or both of the War and Navy Department, as well as with the Commission, the Price Adjustment Board of the Commission shall agree with the Price Adjustment Board or Boards of the Departments involved as to how and by whom negotiations shall be conducted.

The Board shall keep a written record of each action taken by it. The Board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors.

By Order of the United States Maritime Commission.

(Sgd.) W. C. PEET, Jr.,
Secretary.

MAY 5, 1942.

UNITED STATES MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
August 14, 1942.

By virtue of the authority vested in me by Section 403, Title 4, 6th supplement, National Defense Appropriation Act of 1942 (Public Law No. 528, 77th Congress, approved April 28, 1942), I hereby delegate to the Price Adjustment Board of the Maritime Commission, created by Administrative Order No. 64 of the United States Maritime Commission, dated May 5, 1942 and supplements thereto, all authority, duties and responsibilities therein set forth, provided, that renegotiation agreements shall not become final until approved by said Commission.

(s) E. S. Land,
E. S. LAND,
Chairman.

Delegation of Authority under subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. (Public 528, 77th Congress) approved April 28, 1942, as amended through July 1, 1943, herein referred to as the "Act"

to

Arthur G. Rydstrom, Commander U. S. N. R. for execution of clearance agreements

Whenever, as a result of renegotiation under the Act with a contractor or subcontractor assigned by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission, it shall have been found by at least two members of said Board that no excessive profits have been realized in the period or with respect to the contracts or subcontracts as to which such finding shall have been made, Arthur G. Rydstrom, Commander U. S. N. R., a member of said Board, is hereby authorized to enter into a final or other agreement with such contractor or subcontractor pursuant to subsection (c) (4) of the Act with full authority to execute the same on behalf of the Chairman of the Maritime Commission, representing the other Secretaries hereinafter referred to.

Provided, however,

(1) Nothing herein contained shall be construed as modifying the obligation of the Price Adjustment Board of the Maritime Commission and of the officer executing the final agreement

hereunder, to observe and follow the principles, policies and procedures as established from time to time by the Joint Price Adjustment Board;

(2) The agreements referred to herein commonly known as "Clearance Agreements" executed pursuant to this delegation of authority shall be on standard forms now in use by the Price Adjustment Board of the Maritime Commission and there shall be no substantial deviation therefrom without the prior approval of such Board;

(3) No contractor or subcontractor shall be required to inquire into the validity or regularity of any assignment by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission and the signature of the said Arthur G. Rydstrom on behalf of the Chairman of the Maritime Commission shall be conclusive evidence of his authority to execute such agreements on behalf of the Secretary of the various Departments to which the Act applies;

(4) For the purpose hereof the term "Department" includes within its meaning the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company or the Rubber Reserve Company, as the case may be, and the term "Secretary" includes within its meaning the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of

the War Shipping Administration and the Boards of Directors of the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company and the Rubber Reserve Company. The term "Joint Price Adjustment Board" includes within its meaning the Board established by the Secretaries by memorandum dated September 24, 1943.

(5) This delegation of authority to execute clearance agreements on behalf of the various Secretaries is made pursuant to a cross delegation of authority which became effective on October 20, 1943 pursuant to which the authority and discretion so delegated to one of the Secretaries may be exercised by such individuals or agencies within his Department to whom like authority and discretion in respect of contracts with his Department, and subcontracts thereunder, may have been or may thereafter be delegated.

(6) The authority hereby delegated shall be effective as of 12:01 A. M. February 1, 1944 and shall be retroactive to that time and may be revoked or modified at any time thereafter.

EMORY S. LAND,
Chairman of the United States Maritime Commission.

Dated as of February 1, 1944.

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No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1945

[redacted] INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION [redacted]

v.

WATERMAN STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

NO. 435

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION ET AL., PETITIONERS

v.

WATERMAN STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 37–38) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 43–54) is reported at 151 F. 2d 292.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1945 (R. 54). The petition for a writ of certiorari was filed on September 18,

1945, and granted on November 5, 1945 (R. 56). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a United States district court has jurisdiction to entertain an action by a steamship company for a declaratory judgment and an injunction against the Chairman of the Maritime Commission and the Commission's Price Adjustment Board, to establish that certain contracts of the company are not subject to the Renegotiation Act, where the Board has merely notified the company of a renegotiation conference and requested certain information, and where no order has been issued determining that the contracts are subject to the Act, or that excessive profits have been realized thereunder.

2. If so, whether the court should refuse to exercise such jurisdiction, as a matter of discretion.

STATUTE INVOLVED

The Renegotiation Act is set forth in a separate pamphlet filed with the petition for a writ of certiorari, and entitled "The Renegotiation Act." References to this document will be designated "Pamphlet, p. —", throughout this brief.

STATEMENT

On June 27, 1944, respondent, Waterman Steamship Corporation, filed a complaint in the

District Court of the United States for the District of Columbia, against the Chairman of the United States Maritime Commission and the members of the Maritime Commission Price Adjustment Board, seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act, and praying that renegotiation proceedings with respect to such contracts be enjoined (R. 1–35).[1]

The facts as alleged in the complaint, and as shown by the documents and statutes referred to therein, may be summarized as follows:

Respondent owns and operates a large fleet of ocean-going merchant vessels. On and after

[1] Unless otherwise specified, the provisions of the Renegotiation Act referred to in this brief are those in effect immediately prior to the enactment of the Revenue Act of 1943, approved February 25, 1944, 58 Stat. 21, 78. The original Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, 56 Stat. 226, and was amended by the Revenue Act of 1942, approved October 21, 1942, 56 Stat, 798, the Military Appropriation Act, 1944, approved July 1, 1943, 57 Stat. 347, the Act of July 14, 1943, 57 Stat. 564, and the Revenue Act of 1943, *supra*, the last of which supplied the title "Renegotiation Act." The amendments in the Revenue Act of 1943 were in general made effective only as to fiscal years ending after June 30, 1943, but the *de novo* review of renegotiation orders by the Tax Court, added by the Revenue Act of 1943, was made applicable to prior fiscal years. See Section 701 (d) of the Revenue Act of 1943, Pamphlet, p. 49.

The pertinent provisions of these statutes are collected and separately printed in the Pamphlet filed with the petition for a writ of certiorari.

April 25, 1941, respondent entered into a number of charter parties (the "Red Sea Charters"), in form with the British Ministry of War Transport, an agency of the British Government, whereby twelve steamships were chartered by respondent to the latter for the transportation of war goods from the United States to ports on the Gulf of Aden and the Red Sea (R. 2–6, 13).[2] By agreement between the British and American Governments, the Maritime Commission undertook to make the payments to respondent which the British Ministry of War Transport was required to make under these charters (R. 4–5, 20). The charters were performed by respondent, and the charter hire, with the exception of certain demurrage items, was paid to respondent on or before November 28, 1941 (R. 5, 30). (The Red Sea Charters of respondent and of other shipping companies are discussed in a 1944 report by a Congressional subcommittee, summarized in the footnote.[3])

On April 28, 1942, the Renegotiation Act became law, and as subsequently amended, "au-

[2] The charter parties were approved by the Maritime Commission in accordance with Section 9 of the Shipping Act of 1916 (39 Stat. 730, 46 U. S. C. 808) making unlawful, without the approval of the Commission, the chartering of any vessel owned by a citizen of the United States to any non-citizen.

[3] The House Committee on Merchant Marine and Fisheries conducted an investigation into the operations of the American Flag steamship companies under the so-called Red Sea

thorized and directed" the Chairman of the Maritime Commission, *inter alia*, *to* "renegotiate * * * any excessive profits" realized on contracts and subcontracts with the Maritime Commission, and to eliminate such profits by reducing the contract price, by withholding amounts other-

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Charters. On December 19, 1944, a subcommittee reported facts to the full committee (H. Rep. No. 2088, 78th Cong., 2d Sess.) which may be summarized as follows:

By a directive dated April 30, 1941, President Roosevelt ordered the Maritime Commission to assemble two million tons of merchant shipping to aid the democracies. As rapidly as ships could be made available they were loaded with British lend-lease supplies for Red Sea ports. Eighty-one vessels made a total of ninety voyages to the Red Sea area, under charter parties.

The terms of the charter parties and the charter hire were fixed by the Maritime Commission and accepted by the vessel owners in a series of meetings held with representatives of the Commission during late April and early May, 1941. The arrangement made by the Commission with the owners required that the Commission pay the charter hire from Lend-Lease funds and that the owners execute charter parties with the British Ministry of War Transport. Organization of schedules, spotting of cargo and loading berths, and correlation and direction of traffic were handled by the Commission. The charter hire for these voyages was $31,364,880.11, exclusive of demurrage and certain other charges. The voyage profits were $26,874,176.70, or over 80% of the charter hire. In all but one case, the profit per voyage, averaging $300,000, greatly exceeded the depreciated book value of the vessels although the average length of the voyage was only six months. The Committee concluded that the charter rates "were too high, and exceedingly so," and mentioned the possibility of compelling a refund of the excessive earnings of the steamship companies under the provisions of the Renegotiation Act.

wise due to the contractor, or by recovery from the contractor (Sec. 403 (c) (1) and (2); Pamphlet, pp. 6, 8–9). The Act also authorized the Chairman of the Maritime Commission, *inter alia*, to delegate, "in whole or in part," his "authority and discretion" thereunder. (Sec. 403 (f); Pamphlet, p. 5). Pursuant to that provision, the Chairman of the Commission delegated to the Price Adjustment Board of the Commission authority to review profits on war contracts for the purpose of reaching an agreement with the contractor as to the extent to which, if at all, such profits are excessive. In the absence of agreement with the contractor, the Board makes a recommendation to the Commission Chairman, who, if he finds that excessive profits have been realized, makes a determination as to their amount and takes steps for their elimination. (See Appendix, *infra*, pp. 66–75).

On November 26, 1943, petitioner John R. Paull, a member of the Maritime Commission Price Adjustment Board, wrote to the respondent stating that "renegotiation for your company has been assigned" to the Board, whose function is "to review the profits realized * * * under contracts * * * subject to renegotiation" under the Renegotiation Act and "to arrive at a settlement of the amount of excess profits, if any, realized under the Act by the contractor" (R. 21–22). The letter invited respondent to an

initial conference with the Board (set for December 13, 1943, but subject to continuance at respondent's request, R. 22), and requested that at such conference respondent supply certain information relating to its income and expenses during 1941 and 1942, divided between government and commercial business and showing separately operations under the Red Sea Charters (R. 22). The letter explained that at the conference respondent would be free to state reasons, if any, why it was unable to furnish the information requested or why it was not "subject to renegotiation" (R. 23). The letter concluded:

> It is anticipated that after this information has been analyzed by us * * * a mutually satisfactory determination can be made as to whether you have realized excessive profits, within the meaning of the Act.

On December 13, 1943, respondent replied to Mr. Paull, acknowledging that some of its other contracts with government agencies might be subject to renegotiation and suggesting a conference with respect to such contracts, but denying that the Red Sea Charters were subject to the Renegotiation Act because: (a) the charters were not entered into with any "Department" within the meaning of the Act, since they named the British Ministry of War Transport rather than the Maritime Commission; (b) final payment on the charters had been made prior to

April 28, 1942 (although it was recognized that certain demurrage claims against the Commission under the charters were still outstanding); and (c) renegotiation was begun more than one year after the close of respondent's fiscal year within which the charter operations were completed (R. 29–31).[4]

On May 23, 1944, Kenneth F. Clark, counsel for the Board,[5] wrote to respondent's counsel, expressing the opinion that "there was in each case [pertaining to the Red Sea operation] a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable", and suggesting that a conference be held on June 29, 1944 "for the purpose of determining what portion of the profits of these companies is

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[4] The Act applies only to contracts with a "Department," including the Maritime Commission, on which final payment has not been made prior to April 28, 1942. Renegotiation must be started within "one year after the close of the fiscal year of the contractor * * * within which completion * * * of the contract * * * as determined by the [head of the agency] occurs." (See Pamphlet, pp. 11–12, 17–18.)

[5] Mr. Clark was not then a member of the Board. He was later appointed a member, and after this proceeding had reached the court below, he was made a party, upon motion of respondent (R. 39–42).

Mr. Clark, like others of the original petitioners in this Court, has left the Price Adjustment Board. It has also been announced that Admiral Land will resign on January 15, 1946. It is anticipated, therefore, that before the argument in this case, a motion will be made to dismiss some of the petitioners and substitute others where proper.

excessive within the meaning of the Act" (R. 6, 32). The letter stated that although for "technical reasons" the charters had been made with the British Ministry of War Transport, the Maritime Commission had conducted the negotiations with the vessel owners and had agreed to pay and had paid the charter hire to them; and that this arrangement "was evidenced by correspondence between the Commission and the vessel owner" which resulted in a "renegotiable agreement with the Commission" (R. 31–32).

Respondent did not reply to the letter or attend the conference on June 29, 1944. Instead, before any recommendation by the Board to the Chairman of the Commission, and before any decision by the Chairman on respondent's contentions, the latter filed its complaint on June 27, 1944, praying that petitioners, the Commission Chairman and the Board members, be enjoined from requiring respondent to furnish information, from enforcing the Renegotiation Act with respect to the Red Sea Charters, and from initiating criminal proceedings because of respondent's failure to supply information (R. 9–10). The complaint further prayed for a declaratory judgment that the Red Sea Charters are not subject to renegotiation, and that no information with respect thereto can lawfully be required of respondent (R. 10).

Petitioners moved to dismiss the complaint on the grounds that the court had no jurisdiction

over the subject matter, that the complaint failed to show any injury to respondent, and that respondent had not exhausted its administrative remedies (R. 37–38). The district court, pointing out that no administrative order had been issued, dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (R. 38–39).[6] On appeal, the court below reversed, one judge dissenting, and remanded the case to the district court "for consideration of the single question" whether the Red Sea Charters were "contracts with a 'Department' within the meaning of § 403 of the Renegotiation Act of 1942" (R. 52). The district court was permitted, in its discretion, to maintain the *status quo* pending decision of the jurisdictional question, and to require respondent to file a bond insuring "payment to the United States of any amount ultimately found to be due" (R. 52).[7]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the district court had jurisdiction in the circumstances of this case to determine by declaratory judgment whether the Red

[6] The Court also denied respondent's motion for a preliminary injunction (R. 35–39).

[7] As yet, respondent has not sought a temporary injunction in the district court.

Sea Charters were contracts with a "Department" within the meaning of the Renegotiation Act.

2. In holding that such jurisdiction, if it existed, should be exercised.

3. In holding that the motion to dismiss the complaint admitted that the Red Sea Charters were not subject to the Renegotiation Act.

4. In failing to hold that the action was premature in that respondent had not sustained and was in no imminent danger of sustaining any legal injury.

5. In failing to hold that respondent should have exhausted its administrative remedies before seeking judicial relief.

6. In ruling that the district court may, by injunction, maintain the *status quo* pending decision of the jurisdictional question.

7. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

Neither the injunctive nor the declaratory relief sought by respondent is available to it. This is so since there is no case or controversy within the meaning of Article III of the Constitution, the facts stated in the complaint are not sufficient to invoke the equitable jurisdiction of the federal district court, and because there is no "actual controversy" within the meaning of the Declara-

tory Judgment Act. The record shows nothing more than a disagreement between counsel for respondent and counsel for the Commission's Price Adjustment Board as to whether the Red Sea operations are subject to the Renegotiation Act. The Board itself has neither decided that the Act applies to such operations nor that excessive profits have been realized thereunder. Moreover, the Board's decisions would merely be advisory to the Commission Chairman who alone has authority to issue a final renegotiation order.

Respondent's fear of criminal prosecution for failure to supply information sought by the Board is groundless. While the Act imposes criminal penalties for "wilfully" failing to comply with a "demand" by the Chairman for financial information, the complaint clearly shows that no "demand" has either been made or threatened. Moreover a court will not interfere where a refusal to comply with such a demand is based on an honest belief that the Act is inapplicable since such a belief would go far toward showing that the refusal was not wilful. While a judicial decision at this stage may save respondent the expense and annoyance of administrative proceedings, that is not a ground for judicial relief.

II

The decision below disregards the "long settled rule of judicial administration" requiring the ex-

haustion of administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Respondent might secure full relief by resorting to the Board, the Chairman, and the Tax Court.

III

The exclusive jurisdiction of the Tax Court bars respondent's suit in the district court. Congress intended the Tax Court to be the sole forum for review of renegotiation proceedings, and that court's jurisdiction clearly extends to "coverage" questions. If this were not so, its power, described in the statute as the right to make a *de novo* redetermination of excessive profits, would be less plenary than that of the departments. The provision for finality of Tax Court decisions does not excuse disregard of that remedy. While the extent to which Tax Court decisions are reviewable is not before this court, Congress would seem to have the power to make such decisions final on an issue such as is here presented. But insofar as the respondent may constitutionally be entitled to judicial review following the Tax Court's decision, provision has, in effect, been made therefor by the separability clause in the Act. Cf. *Crowell* v. *Benson*, 285 U. S. 22, 62–63. In any event, regardless of finality, Congress intended that aggrieved persons should first apply to the Tax Court for relief, and that tribunal is

certainly capable of affording full relief to the respondent.

IV

The prayer for a declaratory judgment adds nothing to respondent's case. What is here sought is essentially the adjudication of an equitable cause of action, and the district court was "as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." *Great Lakes* v. *Huffman*, 319 U. S. 293, 300. Applying this principle, the district court could not interfere with the administrative proceedings by declaration at a stage where it could not have done so under its power to enjoin. A declaratory judgment is, as a practical matter, no less obstructive to incompleted administrative functions than an injunction, since the executive branch of the Government will observe the court's decision and suspend further proceedings not only in respect of the plaintiff but also as to all others similarly situated. At the very least, the district court did not abuse its discretion in denying relief.

V

Although petitioners are being sued in their individual capacities, they have no personal interest in the controversy and the action against them seeks to control the exercise of their functions as officers of the United States. The suit does not fall within any of the recognized categories ex-

cepted from the sovereign immunity doctrine, and respondent is merely seeking judicial intervention at an earlier stage of the same type of proceeding as was involved in *Mine Safety Appliance Company* v. *Forrestal*, No. 71, this Term, decided December 10, 1945, in which the suit was held to be barred as being an action against the United States to which it had not consented.

ARGUMENT

I

THERE IS NO JUSTICIABLE CONTROVERSY AND NO GROUND UPON WHICH TO INVOKE AN EXERCISE OF THE EQUITABLE JURISDICTION OF THE DISTRICT COURT

Respondent has failed to make out a case for the exercise of judicial power, since the record shows at most a disagreement between counsel for respondent and counsel for the Commission's Price Adjustment Board as to whether certain contracts are subject to the Renegotiation Act. Such a difference of opinion with a body whose authority is confined to making recommendations to the Chairman, and which is itself without power to issue a renegotiation order, cannot create a justiciable controversy.[*]

The same facts which serve to show that there is no case or controversy within the meaning of

[*] Cf. *Electric Bond & Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419, 443, and cases cited; *Willing* v. *Chicago Auditorium Ass'n*, 277 U. S. 274.

Article III of the Constitution serve even more clearly to show that there is no sufficiently imminent or threatened legal injury to justify the exercise of the district court's equity jurisdiction. Cf. *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 322. For this reason and for other reasons adverted to in points II and III of this brief, we think it clear that an injunction would be improper in this case.

The allegations of the complaint show that respondent has merely been requested, by letter of November 26, 1943, from the Board, to present certain information at an initial renegotiation conference, and has been notified, by letter of May 23, 1944, of the opinion of the Board's counsel that certain of respondent's contracts are renegotiable. These, the request and opinion, were thought by the court below to be sufficient to make out an "actual controversy" upon which the judicial power could operate (R. 49, n. 11; R. 44, n. 4 and 5). But the documents in question show on their face that no conclusion has been reached by the Board or the Chairman of the Commission as to whether any of the respondent's Red Sea Charters are subject to the Act. The "Notice of Initial Conference under the Renegotiation Act," requesting respondent to furnish the Board with certain information, explicitly stated that respondent would be "at liberty * * * to state reasons why you are not subject

to renegotiation" (R. 23). The letter of May 23, 1944 from the Board's counsel (R. 31–32) plainly expressed his opinion only, not that of the Board or the Chairman (see R. 54). It was manifestly intended to show that there was a reasonable basis for holding an initial renegotiation conference. Nothing in the letter altered the invitation to respondent contained in the original notice of November 26, 1943, "to state reasons why you are not subject to renegotiation" (R. 23).

In any event, Mr. Clark, the Board's counsel, could not speak for the Board, and the Board has not determined that these contracts are subject to the Act, or that any "excessive profits" have been realized under these or any other contracts of respondent. Even if the Board should ultimately decide both questions against respondent, such decision would merely be advisory to the Chairman of the Commission, who alone has authority to issue the final renegotiation order.[9]

[9] Furthermore, since respondent conceded that a part of its business is renegotiable, the letter, even though it might imply that in the opinion of the Board some of respondent's business was subject to renegotiation, carries no necessary implication as to Red Sea business.

[10] There is set forth in the Appendix, *infra*, pp. 66–68, a letter from the Board, attaching copies of the Administrative Orders establishing and defining the authority of the Board. The letter explains that in the case of a unilateral determination of "excessive" profits, it has been the Board's consistent practice, following its decision, to draft a "unilateral order", which, together with a memorandum of explanation

Thus, the allegation in the complaint (R. 7) that petitioners "intend to and will" make "a unilateral determination of alleged excess profits under the charter agreements" and "unlawfully withhold amounts due the [respondent] from the United States" are "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528, 530 (App. D. C.), certiorari denied, 323 U. S. 774.[11]

The same is true of the allegation (R. 7) that petitioners "intend to and will" unlawfully "re-

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and recommendation is transmitted to the Chairman of the Commission for his signature. If the recommendation is adopted, the order is issued as the order of the Commission Chairman and bears his signature only. The letter further states that the Board has never construed the administrative orders defining its authority as permitting it to issue a unilateral order itself, and that the Board has never issued such an order on its own authority.

[11] The opinions of the Commission and its Chairman, expressed in a letter to a Congressional subcommittee and in a statement to the vessel owners that the "Red Sea Charter" rates were excessive (Hearings before the Subcommittee on Charter Rates of the House Committee on Merchant Marine and Fisheries on H. Res. 52, 78th Cong., 1st Sess., pp. 10 and 13) represent their judgment upon the basis of material then available to them. It is not to be assumed that the Chairman will fail to make an independent determination of the question upon the record before the Board containing such materials and argument as respondent may choose to adduce. Moreover, it has been announced that Admiral Land will resign as Commission Chairman as of January 15, 1946, and there is no assurance that his successor will even share in Admiral Land's preliminary views.

quire" respondent to furnish the information specified in the letters of November 26, 1943, and May 23, 1944 (R. 21–24, 31–32), and that respondent "will be subjected to" the penal sanctions of the Act and incur "the expenditure of large sums of money in defense of criminal prosecutions" for failure to supply the information "demanded" (R. 9). Section 403 (c) of the Act (Pamphlet, p. 4) empowers the Chairman "to demand" financial statements, and imposes criminal penalties for "willfully" failing or refusing to comply, but the complaint does not allege any facts showing that the Chairman or the Board has, by order or otherwise, made or threatened to make any such "demand". The letters referred to above are obviously a "request" rather than a "demand", and it is inconceivable that without a formal and categorical demand under the statute, any criminal prosecution would be instituted for failure to comply. Moreover, even if the letters be deemed a "demand", a court of equity would not interfere to prevent a criminal prosecution to which the respondent could make the ready defense that his refusal to comply "is based on an honest belief that the Act is not applicable". *California* v. *Latimer*, 305 U. S. 255, 260–261; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 387. Even if the Chairman had sought the informa-

tion by administrative subpoena[12] and had instituted judicial proceedings for its enforcement, the respondent would not be entitled therein to an original judicial decision of the "coverage" question prior to the administrative hearing and determination. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501. It cannot be that it is entitled to such a determination in this wholly collateral proceeding instituted before any "demand" has been made.

Since there is absent an actual or immediately threatened invasion of any of respondent's legal rights, there is no occasion for the exercise of the judicial power.[13] Such expense and annoyance as respondent may suffer in connection with renegotiation proceedings before the Board, is "part of the social burden of living under govern-

[12] Under Title XIII of the Second War Powers Act (56 Stat. 185), made applicable by Section 403 (d) of the Renegotiation Act, the Chairman may invoke the aid of Federal courts to compel obedience to subpoenas (see Pamphlet, p. 4).

[13] *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *Employers Group etc.* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 738; *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. C. A. 5), certiorari denied, No. 1306, 1944 Term, June 18, 1945; *National War Labor Board* v. *United States Gypsum Co.*, 145 F. 2d 97 (App. D. C.), certiorari denied, 324 U. S. 856; cf. *Standard Computing Scale Co., Ltd.* v. *Farrell*, 249 U. S. 571, 574; *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, 814 (C. C. A. 2).

ment", and is not the sort of irreparable injury against which equity protects" *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 220–222; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52.

Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Utah Fuel Co.* v. *Commissioner*, 306 U. S. 56, and *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, relied on by the court below (R. 51), are distinguishable. In the *Shields* case, the Mediation Board had already *ordered* the railroad to post certain notices pursuant to the Interstate Commerce Commission's determination that the railroad was not "interurban" (compare *supra*, pp. 18–20); in the *Utah Fuel* case, no other remedy was available to the complainants who sought to prevent the imminent disclosure of allegedly confidential information (compare, *infra*, pp. 22–54); and the *Great Northern Ry.* case was not a suit in equity at all but an action at law to recover "$80 alleged to have been exacted in violation of the carrier's tariff" (259 U. S. at 288).

For much the same reasons as those outlined above, respondent is not entitled to declaratory relief. The Declaratory Judgment Act, 28 U. S. C. 400, permits of relief only in "cases of actual controversy", and there is here presented no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of

a declaratory judgment". *Maryland Casualty Co.* v. *Pacific Co.*, 312 U. S. 270, 273.[14] The Declaratory Judgment Act does not open the Federal courts to those who seek "to obtain an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; see also *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 324.[15]

II

RESPONDENT HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

If the recommendation of the Price Adjustment Board is adverse to respondent, and if the final determination of the Commission's Chairman

[14] See also *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324–325; *Helco Products Co.* v. *McNutt*, 137 F. 2d 681 (App. D. C.); *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *Smith* v. *American Asiatic Underwriters*, 127 F. 2d 754, 756–7 (C. C. A. 9).

[15] *Perkins* v. *Elg*, 307 U. S. 325, upon which the court below relied (R. 50–51), is not to the contrary for, on the issue of Elg's citizenship, upon which a declaratory judgment was sought, there had been a final administrative determination. Moreover, the State Department had refused to issue a passport to Elg, and after there had been a threat of deportation, its execution had been postponed by agreement of counsel, pending termination of the suit. In any event, special considerations were involved, in view of the citizenship issue. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276.

is likewise adverse, respondent will have an adequate remedy in the Tax Court of the United States under Section 403 (e) (2) of the Renegotiation Act, which provides (Pamphlet, pp. 38–39) that

> Any contractor * * * aggrieved by a determination * * * as to the existence of excessive profits * * * may * * * file a petition with The Tax Court of the United States for a redetermination thereof.[15a] Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the [Chairman]. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the [Chairman], but shall be treated as a proceeding de novo.

In holding a declaratory judgment to be available although respondent has failed to resort for relief to the Board, the Chairman, or the Tax Court, the court below disregarded a "long settled rule of judicial administration" requiring that

[15a] The remaining portion of this quotation is taken from Section 403 (e) (1) and is incorporated by reference in Section 403 (e) (2). See Pamphlet, pp. 37–39.

the courts decline to intervene where the applicant has failed to exhaust the administrative remedies made available by Congress.[16]

The court below thought these remedies "not an adequate substitute" for a declaratory judgment in the federal courts because "as the result of the District Court's disclaimer of jurisdiction [respondent] would be subjected to an expensive inquisitorial investigation" (R. 49, 50). If that sufficed to support judicial intervention at the brink of a hearing, there would be little left of the rule as to exhaustion of remedies. That it does not suffice is clear from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52, which rejected just such an argument as ground for interrupting the administrative process. See also *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 220–222.

The court below reasoned that its exercise of jurisdiction would not "improperly interfere with the statutory administrative plan" because (R. 49)—

> it would settle the jurisdictional question in the only forum in which it can be settled—

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[16] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50; *California* v. *Latimer*, 305 U. S. 255; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209; *Newport News Company* v. *Schauffler*, 303 U. S. 54; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300; *Miles Laboratories* v. *Federal Trade Commission*, 140 F. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752; cf. *Levers* v. *Anderson*, No. 51, this Term, decided November 5, 1945.

> at least at this stage of the case. If decided favorably to [respondent], it would completely end the controversy. If decided adversely to [respondent], it would leave the Commission and, if need be, the Tax Court, free to consider the merits.

But a determination in the *Myers* case, and in every other case where an unsuccessful effort was made to obtain a judicial decision of a "jurisdictional" question before the administrative proceedings had terminated might have "completely" ended "the controversy". For instance, in the *Myers* case, a decision by the district courts, before the administrative hearing, as to whether the employer was subject to the National Labor Relations Act, would either have ended the controversy altogether or have left the Board free to continue its hearing as to the employer's alleged unfair labor practices. Yet this Court, relying on an impressive body of authority,[17] ruled that the employer must first exhaust its remedy before the Board, and then, if necessary, seek review in the appropriate circuit court of appeals, in accordance with the statutory plan for review. (303 U. S. at 48–51). The contention that questions of statutory coverage are not subject to the exhaustion rule was considered and squarely rejected in the *Myers* case, in which the Court, citing many authorities, declared (p. 51): "That

[17] See cases cited in 303 U. S. at 51, note 9.

rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

There are practical reasons for applying this principle here, apart from the obvious fact that the Board, the Chairman, or the Tax Court, might decide either that the Red Sea operations were not subject to the Act, or that they gave rise to no renegotiable profits. The question which the court below directed the district court to hear and decide (whether the Red Sea operations constituted "contracts with a 'Department' " within the meaning of the Act) was only one of three questions raised by respondent as objections to the application of the Act. That issue, far from being purely one of law as the court below supposed (R. 51), presents a mixed question of law and fact of considerable complexity, calling for an inquiry into the dealings and arrangements between the Commission and the respondent to determine whether, apart from the charter parties themselves, a renegotiable agreement arose between respondent and the Commission (see R. 31–32). The hearing and determination of this question by the Chairman of the Commission and later by the Tax Court in *de novo* proceedings may involve presentation and consideration of data that would be pertinent to the other two issues of "coverage" raised by respondent in the

court below—whether final payment under the contracts was made prior to April 28, 1942, and whether such payment had been completed in a fiscal year expiring more than one year prior to the commencement of renegotiation proceedings (R. 44–45). While conceding that the latter two may very well be matters "as to which Congress has committed the answer primarily to the Commission," the court below held the first question to be "jurisdictional and fundamental" and susceptible of resolution by declaratory judgment (R. 45). Such selection of one of several issues which an administrative agency would be required to consider in exercising its statutory functions, is contrary to sound precepts. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507–508. Here, as in the cited case, the Commission, in order to perform its "function * * * must draw inferences and make findings from the same conflicting materials" that the court below considered in "anticipating and foreclosing" the administrative conclusion (*Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509).[18]

[18] In the *Endicott Johnson* case, *supra*, the Secretary of Labor had applied to a federal district court for enforcement of a *subpoena duces tecum*, issued by the Secretary in pursuance of an investigation of alleged violations of the Walsh-Healey Public Contracts Act. The subpoena called for payroll and similar records relating to plants of the contractor other than those specified in the contract in question. Despite the defendant's contention that the Act did not cover

Implicit in the decision below is the assumption that little can be said to support the proposition that the Renegotiation Act authorizes the recapture of any excessive profits realized from the Red Sea operations (R. 47–49). In view of the limited record before the court that conclusion was, to say the least, hasty.[19] Moreover, the charters aside, these profits may be subject to recapture because they were realized under contracts embodied in correspondence, which were themselves subject to renegotiation. See *supra*, p. 9. Thus, the question assigned for litigation may, when a full record is developed, prove to be entirely academic. Extensive litigation to obtain a declaratory judgment as to whether the Red Sea charters are subject to renegotiation can accomplish little if in fact other contracts subject to renegotiation underly the charters.

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such plants, this Court held that the district court was under a duty to enforce the subpoena, and was without jurisdiction "to decide the question of coverage itself." (317 U. S. at 509.)

[19] The House subcommittee pointed out facts which might well sustain a contrary conclusion, such as that the Red Sea operation was sponsored, organized, controlled and paid for not by the British Ministry of War Transport but by the United States Maritime Commission, a "Department" named in the Renegotiation Act. H. Rep. No. 2088, 78th Cong., 2d Sess., *supra*, pp. 4–5, note 3. That the charter parties were executed by the British Ministry of War Transport rather than by the Commission may conceivably be little more than a formality, not affecting the substance of the transactions.

III

THE EXCLUSIVE JURISDICTION OF THE TAX COURT TO REDETERMINE RENEGOTIATIONS BARS RESPONDENT'S SUIT IN THE DISTRICT COURT

The court below thought exhaustion of the remedies available in the Commission and in the Tax Court was excused here because before neither body was there an "opportunity * * * for an adequate determination of the jurisdictional question." (R. 51). The court failed to explain why an issue in controversy between respondent's counsel and the Board's counsel could not likewise have been submitted to the Board and the Chairman, either of whom could conceivably have ended the dispute without litigation. That the departmental authorities must of necessity pass upon coverage issues is too clear for argument, since before any computation can be made of profits, excessive or not, the contracts and the business subject to renegotiation must initially be determined and segregated by the renegotiators. By parity of reasoning, the *de novo* proceeding in the Tax Court, after a final order has been issued, must likewise extend to such preliminary questions.

A. *Congress intended the Tax Court to be the sole forum for review of renegotiation proceedings.*—The Tax Court remedy was added to the Renegotiation Act almost two years after its original enactment. The House Ways and Means

Committee, in reporting the bill which provided this remedy, repeatedly emphasized the "exclusive" jurisdiction which the Tax Court would have in redetermining the amount of excess profits. (H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76–77, 84–85.) In the House, Congressman Disney, a member of the Committee and a sponsor of the provision, justified it as follows (89 Cong. Rec. 9929):

> The Tax Court was chosen to perform this function for four principal reasons. The first is, that the Tax Court deals with very similar problems under the excess profits tax. The second * * * is the fact that [its] judges hold court all over the United States and hence the contractors will not have to come to Washington to be heard by the court. The third is that the use of one forum will bring about uniformity in the development and application of principles of decision; and the fourth is that a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits * * *.

After the House passed this provision, the Senate Finance Committee and the Senate, while agreeing that one forum should be given "exclusive" jurisdiction to make a *de novo* review of renegotiation determinations, substituted the Court of Claims for the Tax Court to perform this function (S. Rep. No. 627, 78th Cong., 1st Sess.,

pp. 34, 110; 90 Cong. Rec. 534). The conferees reinstated the Tax Court (H. Rep. No. 1079, 78th Cong., 2d Sess., p. 84), and the Senate accepted the Conference Report (90 Cong. Rec. 1301). In the House, Congressman Disney pointed out that under both the House and Senate versions, the review of renegotiation determinations (90 Cong. Rec. 1355)

> is required to be treated as a de novo proceeding in which *all questions of fact and law* may be decided. The conference report makes no change in this regard * * *. [Italics supplied]

Congressman Izac, a member of the conference committee from the House, also commented upon the provisions for "court review", saying (*id.* 1357):

> We of the Naval Affairs Committee suggested that they have recourse to the district courts of the land, but disregarding our recommendations it was decided to put it first in the Claims Court, and finally in The Tax Court.[29]

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[29] The House Committee on Naval Affairs, reporting on the "Renegotiation of War Contracts", had earlier recommended "that the Renegotiation Act be amended so as to provide that, whenever one of the Secretaries has made a unilateral determination, the contractor concerned may obtain judicial review of that determination in the United States District Court in the district in which the contractor maintains its principal place of business, within 60 days after the publication of the unilateral determination." H. Rep. No. 733, 78th Cong., 1st Sess., p. 34.

The conference bill was accepted by the House (*id.* 1359) and became law.

This material plainly shows that Congress considered and expressly rejected review by the district courts of renegotiation determinations, and instead provided for a *de novo* hearing by a single expert tribunal, the Tax Court, in order to "bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929), giving that tribunal "exclusive" jurisdiction extending to "all questions of fact and law" (90 Cong. Rec. 1355).[21]

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[21] The provision that an aggrieved contractor "may" file, rather than "shall" file a petition in the Tax Court, does not make the Tax Court remedy an "option" or "privilege" which the contractor is free to accept or reject. Obviously, Congress used the permissive "may" because it did not wish to require a contractor to seek review; "the alternative afforded by the use of the word 'may' is between seeking relief or submitting" to the Chairman's determination. *Lewis* v. *City of Lockport*, 276 N. Y. 336, 344, 12 N. E. 2d 431, 434. Such is the unquestioned practice under the tax laws which provide that a taxpayer "may" file a petition in the Tax Court for a redetermination of a tax deficiency; and this provision of the taxing statutes is essentially the model for the Tax Court remedy in the Renegotiation Act. See *infra*, pp. 34–36. This Court has uniformly held that statutory remedies, no less permissive in form, must be exhausted before judicial review is sought. *Pittsburgh &c. Ry.* v. *Board of Public Works*, 172 U. S. 32, 44–45; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229–230; *First National Bank* v. *Weld County*, 264 U. S. 450, 453–455; *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265, 269–270; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575–576; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463.

B. *The jurisdiction of the Tax Court extends to "coverage" questions.*—Conceding that Congress "may very well" have committed "primarily to the Commission" the issues whether lapse of time since final payment or completion of the contracts bars renegotiation (R. 45), the court below thought that the issue whether there were contracts with the Commission is "jurisdictional and fundamental", and, therefore, that respondent is entitled to invoke the Declaratory Judgment Act even before the administrative proceedings have been completed (R. 45). This decision, drastically narrowing the province of the Tax Court, squarely conflicts with the legislative intention and would seriously undermine the exclusive statutory review plan outlined above (pp. 23, 29–32). Respondent seeks to draw support for this restriction from the grant to the Tax Court, in Section 403 (c) (Pamphlet, p. 37), of the power to redetermine the "amount", if any, of excessive profits. It urges that the Tax Court's inquiry is to be con-

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The provision that the Tax Court shall have exclusive jurisdiction "Upon such filing" is similar to that used in many statutes whose effect is to create exclusive jurisdiction. See, *e. g.*, Fair Labor Standards Act, 52 Stat. 1065, 29 U. S. C. 210; Securities and Exchange Act, 48 Stat. 901, 15 U. S. C. 78y (a); Holding Company Act, 49 Stat. 834, 15 U. S. C. 79x; Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717r (b); Federal Power Act, 49 Stat. 860, 16 U. S. C. 825l (b); Food, Drug and Cosmetic Act, 52 Stat. 1052, 21 U. S. C. 355 (h); Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646 (d); Federal Alcohol Administration Act, 49 Stat. 978, 27 U. S. C. 204 (h).

fined to a reexamination of the "excessiveness" of the profits under the contracts covered by the renegotiation order, without reexamining whether such contracts are subject to the Act.

1. It is obvious, from a comparison of the Renegotiation Act with the Internal Revenue Code, that the Tax Court remedy was drafted with the Internal Revenue Code as a model. The authority of the Tax Court to "redetermine" the "amount" of excessive profits is the counterpart of that Court's authority under the taxing statutes to "redetermine" the "amount" of a tax deficiency (compare Sec. 403 (e) of the Renegotiation Act (Pamphlet, pp. 37–39) with Internal Revenue Code, Sections 271 and 272).[22] And under the Internal Revenue Code, the jurisdiction of the

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[22] The Internal Revenue Code provides, in part (26 U. S. C.):

§ 271. *Definition of deficiency.*

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; * * *

§ 272. *Procedure in general—(a) (1) Petition to Board of Tax Appeals.*

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax

Section 403 (e) (1) of the Renegotiation Act provides, in part:

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally de-

Tax Court to consider "coverage" questions is, and was at the time of the adoption of Section 403 (c) of the Renegotiation Act, beyond question.[23] Indeed, the Tax Court even considers

imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

(b) *Collection of deficiency found by Board.*

If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. * * *

* * * * *

(c) *Increase of deficiency after notice mailed.*

The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, * * *.

termine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.

* * * * *

[23] See, for example the following cases in which the Tax Court's authority to decide "coverage" questions was assumed: *Blair* v. *Oesterlein Co.*, 275 U. S. 220 (appli-

and decides constitutional questions arising under the tax laws.[24] We submit that the established authority of the Tax Court under the tax laws to consider all questions of law, including "coverage" issues, when redetermining the "amount" of a tax deficiency is "highly relevant and material evidence of the probable general understanding of the times and of the opinion of men who probably were active in the drafting" of the similar provisions in the Renegotiation Act. Cf. *Better Business Bureau of Washington, D. C., Inc.* v. *United States*, No. 52, this Term, decided November 13, 1945, slip opinion, p. 6.

2. To deny to the Tax Court jurisdiction over "coverage" questions would squarely conflict with several important provisions of Section 403 (e). That Section expressly provides that a Tax Court

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cability of special assessment provisions of Revenue Act of 1918); *Dobson* v. *Commissioner*, 320 U. S. 489 (whether particular recovery by taxpayer was income or a return on capital); *Helvering* v. *Clifford*, 309 U. S. 331 (whether income under a trust was taxable to the settlor); *Underwriters' Laboratories* v. *Commissioner*, 135 F. 2d 371 (C. C. A. 7), certiorari denied, 320 U. S. 756 (whether respondent was a charitable, scientific or educational organization or a business league exempt from corporate and excess profits tax); *Commissioner* v. *Aluminum Company of America*, 142 F. 2d 663 (C. C. A. 3), certiorari denied, 323 U. S. 728 (applicability of the Vinson Act, 48 Stat. 503, 34 U. S. C. 496, to certain contracts).

[24] See *Dobson* v. *Commissioner*, 320 U. S. 489, 502; Mertens, *Law of Federal Income Taxation*, Section 50.21; Hamel, *Practice and Evidence Before the United States Board of Tax Appeals*, p. 78.

proceeding "shall be treated as a proceeding *de novo.*" The normal understanding of a *de novo* proceeding is one in which the entire case is re-examined; and this is the manner in which the Tax Court has traditionally operated in reviewing tax deficiencies. Since the departmental officers entrusted with renegotiation must of necessity make a selection and determination of the contracts subject to renegotiation under the Act before they can proceed to compute the profits thereunder and make a judgment as to their excessiveness, the Tax Court in its *de novo* consideration of the matter must likewise examine into that preliminary issue. Otherwise, the proceedings in the Tax Court would become "*de novo*" only in part, the decision of the agency on the important jurisdictional question being final before the Tax Court. It is not to be supposed, in the absence of clear statutory language compelling the result, that Congress intended to entrust to the Tax Court only part of the renegotiation functions performed at the lower administrative level. The contrary intention is revealed by the statement of Congressman Disney on the floor of the House, that the Tax Court provision calls for a "de novo proceeding in which all questions of fact and law may be decided" (90 Cong. Rec. 1355). This is the only sensible construction of a *de novo* proceeding, which is in effect a new renegotiation of war contracts and

which must therefore involve the same initial steps of consideration and selection of contracts subject to the Act as took place in the prior renegotiation.

Congress has given additional evidence of its intention to provide complete review in the Tax Court by authorizing that court to determine as the amount of excessive profits "an amount either less than, equal to, or greater than" that specified in the renegotiation order. This authorization would be partially nullified by respondent's reading of Section 403 (e), for it would preclude the Tax Court from increasing the amount of excessive profits through a finding that such profits had been realized under contracts which the departmental authorities had held not to be subject to renegotiation; and conversely, from decreasing the determination through a finding that contracts had been erroneously included by the agency.[25]

3. Respondent's view of the Tax Court's function would, as a practical matter, play havoc with the statutory scheme of redetermination. "Coverage" questions are constantly arising in the day to day administration of the Renegotiation Act, which is replete with exceptions and exemptions

[25] Contrary to respondent's contention (Br. in Opp., p. 29, n. 25), the elimination of the requirement that the Tax Court make findings of a fact in renegotiation cases, has no bearing upon the authority of the Court to consider "coverage" issues. Since Congress expressly provided that the Tax Court's determination was not to be judicially reviewed (see discussion, *infra*, pp. 43–54), findings of fact would serve no purpose.

affecting the "jurisdiction" of the renegotiation authorities. See *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations under the Renegotiation Act* (March 31, 1943) pp. 9–10; see also Pamphlet, pp. 11–12, 13–14, 16–18. As noted in the petition for a writ of certiorari in this case (p. 11), of some 200 renegotiation cases then pending in the Tax Court, approximately 130 (about 65 percent) raised an issue of coverage.[26] If the district courts are permitted to resolve "coverage" issues at the outset of renegotiation proceedings, even before the administrator or the Tax Court has had an opportunity to form a judgment on that question, 65 percent of the cases pending in the Tax Court might be transferred to the district courts for determination of the "coverage" questions. This would frustrate the Congressional scheme for centralized review in the Tax Court and render impossible the uniformity of decision which Congress clearly sought to ensure (see *supra*, pp. 29–32). Moreover, it would tend substantially to defeat the Congressional purpose to assure speedy renegotiation.[27]

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[26] Of these, some 110 cases (or about 55 percent of the total) raised issues of coverage other than those which the court below indicated (R. 45) might not be the subject of declaratory relief.

[27] This purpose is manifest not only in the statutory plan for review, but in other provisions of the Act, *e. g.*, Section 403 (c) (6) requiring renegotiation to commence within one

Any reading of Section 403 (c) which would exclude "coverage" questions from the Tax Court's conceded jurisdiction over the "amount" of excessive profits ignores the essential nature of a determination that profits under certain war contracts are "excessive." To determine whether a company's profits are excessive, there must be, as we have pointed out, a segregation of renegotiable from nonrenegotiable business. The renegotiation authorities may decide that, of the company's five contracts under scrutiny, two, upon which losses were sustained, are not covered by the Act. Had these two been covered, they might balance out against the profits realized on the other three contracts, and thereby preclude any finding of excessive profits. See *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations under the Renegotiation Act* (March 31, 1943) p. 7. It is therefore wholly unrealistic to suggest that the Tax Court is to confine its inquiry in such a case to whether the profits on the three contracts selected were excessive; the Tax Court must also look to see whether the two unprofitable contracts

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year after the close of the fiscal year of the contractor within which completion or termination of the contract occurs; Section 403 (c) (3) requiring that renegotiation orders issue within one year following the commencement of the renegotiation proceeding; and Section 403 (e) (1) providing that the filing of a petition in the Tax Court "shall not operate to stay execution" of the renegotiation order.

are covered before it can make any sensible determination that the company realized "excessive" profits on its war contracts as a whole for the given fiscal year. All of the foregoing considerations, we submit, make it clear that in using the word "amount" of excessive profits, Congress could not have intended to exclude "coverage" questions from the jurisdiction of the Tax Court.[28]

The renegotiation proceeding with respect to a war contractor normally extends to all of its contractual operations for a particular fiscal

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[28] Respondent has argued (Br. in Opp. pp. 31–32) that since Section 403 (e) in terms only permits aggrieved "contractors" to file Tax Court petitions, no Tax Court remedy is available to respondent unless respondent concedes that it is a "contractor" insofar as the Red Sea Charters are concerned. This contention hardly merits serious consideration. Since respondent appears to agree that certain of its contracts other than the Red Sea Charters are subject to the Act (R. 30), its standing in the Tax Court would seem assured. Moreover, to exclude persons such as respondent from the Tax Court would run counter to the efforts of Congress to funnel review of renegotiation proceedings into the Tax Court (see discussion, *supra*, pp. 29–32). Under comparable provisions providing for redetermination of tax deficiencies by the Tax Court, the language permitting any "taxpayer" to petition for Tax Court review unquestionably allows such a petition by a person claiming to be completely exempt from the taxing statute involved. See, *e. g., Underwriters' Laboratories* v. *Commissioner*, 135 F. 2d 371 (C. C. A. 7), certiorari denied, 320 U. S. 756. The decision in *In re Fassett*, 142 U. S. 479, upon which respondent relies (Br. in Opp. pp. 29–31), turned upon the particular language and scheme for review provided by the Customs Administrative Act, and the Court's opinion did not enunciate any principles applicable here.

period.[29] If the district courts and, on appeal, the circuit courts of appeals and this Court, are permitted to resolve coverage questions with respect to some of the company's contracts at the outset of the renegotiation proceeding, the ensuing delay would affect not merely the contracts giving rise to the particular controversy, but all the contracts involved in that renegotiation proceeding.

A segregation of contracts with the "Departments" and related subcontracts from ordinary commercial business is one of the most difficult and fundamental of the renegotiation problems. The number of contracts, purchase orders and supply contracts entered into each year by any significant producer of war material is numbered in the tens of thousands, and the segregation of renegotiable from nonrenegotiable business must be accomplished by the use of recognized accounting techniques. To hold that the Tax Court has no power to determine whether contracts are subject to renegotiation would, as a practical matter, eliminate the Tax Court from renegotiation and cast upon the Federal courts the well-nigh impossible task of examining in detail many thousands of supply contracts and subcontracts executed in connection with the war program. Most Tax Court proceedings would have to be

[29] See Blough, *Renegotiation Standards and Practices* (1943), *10 Law and Contemporary Problems*, pp. 276, 277.

postponed to await the determination, in extensive litigation in the federal courts, of which of the many thousands of contracts of each supplier are contracts with a Department or related subcontracts. And, as the dissenting judge below noted, "it is naive to think that this device [the declaratory judgment suit] would not be used for purposes of delay" (R. 68).

C. *The provision for finality of Tax Court decisions does not excuse disregard of that remedy.*—Vesting in the Tax Court "exclusive jurisdiction * * * to finally determine the amount, if any, of such excessive profits", Congress explicitly announced that "such determination shall not be reviewed or redetermined by any court or agency" (Sec. 403 (e), Pamphlet, p. 37). Respondent relies upon that provision as justifying disregard of the Tax Court and resort to the district court (Br. in Opp., pp. 36–37), but this position is untenable.

1. Whether a decision by the Tax Court is judicially reviewable, and what issue, if any, would be foreclosed by its judgment, is not before this Court or pertinent to a consideration of the instant case. The Tax Court has not been asked by respondent to decide and has not decided any aspect of the controversy at hand. The extent to which a judgment of that court can or should be judicially reexamined, despite the statutory language, is not a matter to be decided in the at-

stract, before a record is made in the Tax Court, and before it is known what issues the Tax Court has been asked to decide, what issues it has decided, and what issues the contractor seeks to have reviewed in another forum. For whatever the finality of a Tax Court decision, it is plain that Congress intended that persons aggrieved by renegotiation orders should at least seek initial relief in the Tax Court, and not in the district courts.

Since respondent might receive in the Tax Court all the relief it claims, nonreviewability of that body's determination does not excuse a failure to invoke its jurisdiction. In *First National Bank* v. *Weld County,* 264 U. S. 450, this Court held that a taxpayer's suit to recover taxes paid under protest was not maintainable in a district court where the plaintiff had failed to avail itself of an administrative remedy afforded by state law. Rejecting the contention that resort to that remedy was excused because "no appeal to a judicial tribunal was provided" from the administrative decision, Mr. Justice Sutherland, speaking for a unanimous Court, said that it could not "assume that if application had been made to the Commission proper relief would not have been accorded by that body" (264 U. S. 454–455). So here, the *de novo* determination which the Tax Court is directed to make would render wholly immaterial errors of judgment, in fact or law,

committed during the proceedings before the Chairman. "It is not to be assumed" that if respondent were to apply to the Tax Court, following the issuance of a unilateral renegotiation order, it would be denied "any right to which it is entitled." Cf. *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183; 188.

2. If the reviewability of Tax Court decisions need be considered here, we maintain that in providing finality for Tax Court decisions, Congress did not exceed its lawful powers.

This Court has sustained a statute which left very similar questions of excessive profits to the final decision of the Board of Tax Appeals, now the Tax Court. The Revenue Act of 1918 (Sec. 328, 40 Stat. 1057) provided for a special computation of excess profits taxes by the Commissioner of Internal Revenue upon a finding by him that the ordinary computation, owing to abnormal conditions, would work exceptional hardship on the taxpayer. Under the special computation, the tax was the amount bearing the same ratio to the net income of the taxpayer as "the average tax of representative corporations engaged in a like or similar trade or business" bore to the taxpayer's average net income for the year in question. This Court held that the Board of Tax Appeals had jurisdiction to review the Commissioner's action under this provision (*Blair* v. *Oesterlein Co.*, 275 U. S. 220), but thereafter held that Congress did not intend tax-

payers to have any court review of (1) the action of the Commissioner in denying a claim for special computation, or (2) his determination as to the rate of tax to be applied in the event of the allowance of a claim for special computation. *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Williamsport Co.* v. *United States*, 277 U. S. 551. In the latter case, it was held that the Court of Claims was without jurisdiction of a suit to recover excess profits taxes assessed and alleged to have been illegally collected under the Revenue Act of 1918, and that the determination of the Commissioner and the Board of Tax Appeals on this issue was final. Observing that the "considerations" which demanded special assessment under the Act were "facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information", Mr. Justice Brandeis said (277 U. S. at 561–562):

> Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§ 327 and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under § 24 (20) of the Judicial Code. Thus the determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review

> by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying decisions would tend to defeat, rather than promote, that equality in the application of the revenue law which §§ 327 and 328 were designed to insure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities.

These reasons apply with equal force to determinations made by the Tax Court in connection with renegotiation. Congress chose the Tax Court to perform that function because it "deals with very similar problems under the excess profits tax" and because "the use of one forum will bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929). Here, as under the Revenue Act of 1918, a proper determination in a "delicate and complex phase" of administration requires the exercise of expert judgment in the light of accounting practice, industry statistics, and profits allowed or voluntarily accepted under comparable circumstances. The typical renegotiation case requires

that due consideration be given to such matters as costs, profits, losses, contingent liabilities, operating efficiency, price policies, war financing, taxes, plant conversion, peacetime earnings, depreciation, amortization, working capital and other concepts familiar to those who administer or adjudicate the revenue law.[30] Because it considered the Tax Court to be "peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose," Congress conferred upon it exclusive and final powers of decision. H. Rep. No. 871, 78th Cong., 1st Sess., p. 77.

Certainly there is no basis for respondent's contention (Br. in Opp. pp. 36–37) that Tax Court review of excessive profits under the Renegotiation Act is "incapable of affording due process".[31] Cf. *Yakus* v. *United States*, 321 U. S. 414, 435.

[30] See, *e. g.*, Sec. 403 (c) (3) of the Act (Pamphlet, p. 10) which requires that "In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code."

[31] In urging that the Tax Court does not afford it an adequate avenue of relief from an excess profits determination by the Chairman, respondent argues that if money is erroneously withheld and covered into the Treasury of the United States, respondent will be unable to secure a refund, and will be denied interest on the amount erroneously withheld (Br.

in the Tax Court (Pamphlet, pp. 37–39) is not to be "treated as a proceeding to review" the renegotiation order of the Secretary but "as a proceeding de novo", *i. e.*, without prejudice to the contractor on account of prior determinations of excessive profits within the department. This proceeding would be had in a forum which, in the words of this Court, "has established a tradition of freedom from bias and pressures," whose "procedures assure fair hearings" and whose "deliberations are evidenced by careful opinions". *Dobson* v. *Commissioner*, 320 U. S. 489, 498. These safeguards render of little moment the technical classification of the Tax Court with quasi-judicial agencies in the executive branch rather than with a judicial tribunal like the Court of Claims. As this Court observed in *Switch-*

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in Opp. pp. 39–42). Such contentions are unsound, for the provision for Tax Court redetermination obviously contemplates a refund of any amount by which the excess profits determination is reduced by the Tax Court. Furthermore, Congress has made an appropriation explicitly available for refunds of "any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity * * *". (Pub. L. No. 40, 79th Cong., 1st Sess., approved April 25, 1945). This removes all possibility of injury to an aggrieved contractor who applies to the Tax Court for a redetermination of his excess profits. Cf. *Stratton* v. *St. L. S. W. Ry.*, 284 U. S. 530; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481; *Arkansas Building Association* v. *Madden*, 175 U. S. 269.

men's Union v. *National Mediation Board*, 320 U. S. 297, 303:

> Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock* [250 U. S. 328].[32]

3. Insofar as respondent may constitutionally be entitled to judicial review of the issue of coverage or any other issue after its decision by the Tax Court, the Act permits it. The finality and nonreviewability of the Tax Court's determination (Sec. 403 (e) (1)), we believe, extends to the coverage question here involved. But if such a construction of the statute would deprive respondent of any rights or privileges under the Fifth Amendment, by denying it judicial review of an issue which Congress cannot validly exclude from the courts, then to that extent the provision for finality does not apply. This is so because, as is true of all other statutory language, the Tax Court provisions must be read together with the Constitution, and any exceptions and qualifications re-

[32] See also *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; cf. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536; *Reetz* v. *Michigan*, 188 U. S. 505, 507.

quired by the Constitution must be read into the statute if its language and the Congressional intention do not forbid it. Here, Congress has expressly taken care of this contingency by adding a separability clause to the Renegotiation Act (Sec. 403 (g); Pamphlet, p. 39), which in effect announces that the Tax Court determination shall be final and unreviewable only to the extent that the Constitution permits it. Cf. *Crowell* v. *Benson*, 285 U. S. 22, 62–63; *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 169–170. Read in this context, the Tax Court provisions of the Act leave a person aggrieved by a renegotiation determination with such access to such judicial relief, available under the general jurisdiction of the courts, as the Constitution requires. And the constitutional right of judicial review, whatever it may be, is not waived by proceeding in the Tax Court, but can be invoked in the appropriate court upon completion of the Tax Court proceeding. Cf. *St. Louis &c. R. Co.* v. *Public Comm'n*, 279 U. S. 560; *Lawrence* v. *St. L.–S. F. Ry.*, 274 U. S. 588; see also *Lockerty* v. *Phillips*, 319 U. S. 182, 188.

The enforcement machinery provided by the Act affords adequate opportunity for judicial review of issues constitutionally protected against administrative finality. A final renegotiation determination as to excessive profits may be enforced only by the methods authorized in the Act: (1) reduction in contract price, (2) withholding

amounts otherwise due, (3) directing another contractor to withhold amounts otherwise due, or (4) suit to recover (Section 403 (c) (2), Pamphlet, p. 9). If the Government utilizes the first or second methods of enforcement, the contractor, after he has established the right to apply to a court by exhausting his administrative remedies (see *supra*, pp. 22–28), may, if the Constitution requires an additional remedy in court, sue the United States for the amounts otherwise due under the contracts, and when the United States asserts the renegotiation orders as the justification for the reduction or withholding, the contractor may obtain a judicial decision as to any appropriate issue, such as the validity of the Act. If the Government directs a prime contractor to withhold sums otherwise due to a subcontractor (the renegotiated company), the latter may obtain the same type of judicial decision in a suit at law against the prime contractor, in which the defendant would be obliged to plead as a defense the renegotiation order and the Government's directions to withhold monies from the plaintiff. If the Government should bring an affirmative suit to recover under the renegotiation order, the de-

[33] Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 322–323; *Coffman* v. *Federal Laboratories, Inc.*, 323 U. S. 325, 326–327.

Where, in such a suit, an issue as to the constitutionality of the Act arises, the United States would unquestionably be certified to intervene as a party pursuant to the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. 401.

fendant may likewise obtain a judicial decision as to any appropriate issue, such as the validity of the Act. It is significant that before the Tax Court remedy was afforded by the Revenue Act of 1943, Congress recognized that the forum available for appropriate judicial action would depend on the method chosen by the Government to enforce determinations of excessive profits.[24] Since there "is no constitutional requirement that [the] test" as to the vindication of constitutional rights "be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process" (*Yakus* v. *United States*, 321 U. S. 414, 444), the system of Tax Court redetermination plus judicial review in a further proceeding to the extent constitutionally required is entirely valid.

Respondent's reliance (Br. in Opp. p. 26) on *Stark* v. *Wickard*, 321 U. S. 288, is misplaced. In that case this Court held that milk producers had standing to enjoin the Secretary of Agriculture from carrying out certain provisions of a milk order allegedly unauthorized under the Agricultural Marketing Agreement Act of 1937, which

[24] In the 78th Cong., 1st Sess.: Investigation of the Progress of the War Effort, Hearings before H. Committee on Naval Affairs, pursuant to H. Res. 30, p. 507; see also Hearings before S. Committee on Finance on H. R. 3687, p. 990; Hearings before H. Committee on Ways and Means on H. R. 2324, 2698 and 3015, pp. 109 and 110; Hearings before the Subcommittee of the S. Committee on Appropriations on H. R. 2996, p. 137.

the producers claimed would have reduced the minimum prices to which they were entitled under the Act. Stating that "executive officers may be restrained from threatened wrongs in the ordinary courts *in the absence of some exclusive alternative remedy*" (p. 290), this Court held that although the Act did not specifically grant producers a right to judicial review of the Secretary's action, "the Congressional grant of jurisdiction [to hear the] proceeding appears plain" (p. 307); that "the silence of Congress as to judicial review is, at any rate *in the absence of an administrative remedy*, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts" (p. 309); and that the Act provided "no forum, other than the ordinary courts, to hear [the producers'] complaint" (p. 309) [italics supplied].

In the instant case, an "exclusive alternative remedy"—the Tax Court—is "the forum, other than the ordinary courts" provided by Congress to hear respondent's complaints, and some judicial body, the Court of Claims or the district courts (depending upon the mode chosen to enforce the renegotiation order), affords respondent such review in addition to "administrative determinations" as the Constitution may require.[35]

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[35] The exclusive Tax Court remedy also disposes of respondent's argument (Br. in Opp. p. 38) that equity jurisdiction here may be based upon the danger of a multiplicity of suits.

IV

THESE PRINCIPLES APPLY TO A DECLARATORY JUDGMENT SUIT

Respondent's complaint in the district court sought both an injunction and a declaratory judgment (R. 10). The court below held that the district court had jurisdiction to issue a declaratory judgment and suggested that were the Declaratory Judgment Act not available the court "might go farther and hold" that the district court had jurisdiction to issue an injunction (R. 51). Under Point I of this brief, we have sought to show that the absence of a justiciable controversy bars either form of relief. Our arguments in Points I, II, and III suffice to indicate the unavailability, in any event, of the injunctive remedy, and we propose to show here that respondent's failure to exhaust its administrative remedies and to invoke the Tax Court's exclusive jurisdiction over review of renegotiation proceedings operates to preclude declaratory relief.

Respondent's suit being "essentially an equitable cause of action", the district court was as "free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 300. The corollary of this principle is that a court may not, by declaration, "stop or interfere with administrative proceedings at a point where it would not, under settled principles, have

interfered with or stopped them under its power to enjoin". *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. 2d 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559. Thus in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 46, and *Newport News Co.* v. *Schauffler,* 303 U. S. 54, 56, prayers for declaratory relief did not serve to take the cases from without the rule requiring exhaustion of administrative remedies.

Cogent reasons of policy require that a declaration be withheld where an injunction against a governmental function would not be granted. Cf. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 463. While the declaratory judgment is not in form restrictive of continuation of the administrative process, its effect is often the same as an injunction. The administrative agency whose acts have been challenged in the courts will normally suspend the proceedings until the challenge has been adjudicated, and what is even more significant, will as a rule suspend similar proceedings against all in the same category as the plaintiff. This is graphically demonstrated in the instant case, where renegotiation proceedings to recapture excessive profits, if any, have been halted not only as against respondent, but also in respect of all other shipping companies which had operated under Red Sea Charters. The result is a virtual halt of the adminis-

trative functions to which the issue in suit is relevant, to the same extent as if all such functions had been enjoined.

This coercive aspect of the declaratory judgment suit against Government officers serves to distinguish the operation of that procedure against a private defendant. Unquestionably, the declaratory judgment has its value in resolving disputes between parties as a guide to their future conduct, even though no other traditional form of judicial relief is sought or is available. See Borchard, *Declaratory Judgments*, (2d ed. 1941) pp. 279, *et seq.*; Judicial Code, Sec. 274d (28 U. S. C. 400 (1)). Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227. Where the interests involved are purely private, there may well be more reason for resolving the dispute at the earliest justiciable stage; there is certainly not as much public or governmental interest in the resolution of the controversy in some other manner.

The contrary is true where the functions of government are involved, and where the act of government against a single individual or company serves as the pattern or prototype for similar acts against a great number of other individuals or companies similarly situated. Hence, a challenge as to the validity of a regulation, albeit by one individual, must be viewed as an attempt to stop the wheels of government to a

degree varying with the number of others in a like category. We submit that the same principles applicable to the grant of an injunction against a federal officer should control the grant or denial of a declaratory judgment, particularly where its effect would be to halt the administrative process on a broader scale than the plaintiff's interests alone. We see nothing in the Declaratory Judgment Act (28 U. S. C. 400) suggesting a Congressional purpose to sweep aside deeply rooted principles governing the appropriate relationship between courts and administrative agencies, and to permit litigants to make what has long been recognized to be an untimely attack upon administrative action. The principles which have long impelled courts of equity to withhold relief when administrative action was uncompleted are no less valid now than prior to the Declaratory Judgment Act. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672. The declaratory judgment, which likewise involves an

exercise of discretion (see *supra*, p. 55, and *Federation of Labor* v. *McAdory*, 325 U. S. 450, 462), should be governed by the same rules.[36] Here, the private right will not suffer from the denial of jurisdiction because respondent may obtain full relief without resort to the federal courts.

We think it clear that "there was an insuperable objection to the maintenance of [this] suit in point of jurisdiction", *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52, but that at the very least, it can hardly be said, in the light of the considerations already adverted to, that there was an abuse of discretion in the denial of relief by the district court.[37]

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[36] The court below relied (R. 51) in part, upon a quotation from Borchard, *Declaratory Judgments* (2d ed. 1941) 878, to the effect that "where administrative authority over a particular transaction or business is in dispute, and, the facts being established, the issue of jurisdiction is purely one of law, there is no reason why the courts cannot make a declaration, although in some of these cases an injunction would be refused." Even if we assume this statement to be sound, it is clearly inapplicable to this case. For, as noted earlier (*supra*, pp. 26–28), the instant case is not one where the facts are established. The issue is a mixed question of law and fact of considerable complexity, requiring an extensive inquiry into the actual dealings between respondent and the Commission, for example, to determine whether there were negotiations and arrangements between them, which, apart from the charter parties themselves, gave rise to a renegotiable agreement between respondent and the Commission.

[37] Respondent argues (Br. in Opp. p. 38) that the Chairman might enforce a unilateral renegotiation order both by withholding sums otherwise due respondent, and by directing

V

THIS IS A SUIT AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED

Respondent's suit is directed against Federal officers to enjoin the performance of a function entrusted to them by statute and is based implicitly upon the assumption that the United States, in whose name the conduct complained of is being carried out, is as a matter of law not so directly involved as to deprive the court of jurisdiction. The theory must be that the defendants, by virtue of exceeding their statutory authority, are acting or about to act as trespassers in the sense of violating some legally protected right of the plaintiff, and that the overstepping of the statutory bounds strips the cloak of official authority from the defendants so that they act wrongfully as individuals rather than as agents of the Government. Cf. *Ex Parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

While the point was not raised or argued in the court below, we believe it of sufficient impor-

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contractors to withhold sums due respondents; and that respondent would then find it necessary to institute a number of suits in both the Court of Claims and the district courts in order to challenge fully the renegotiation order. Such multiplicity is highly conjectural since the mode of enforcement of the hypothetical order lies in the future. Certainly, it is not impossible or unlikely that the Government would choose a method involving only one law suit. See also *supra*, p. 54, note 35.

tance to present it here. The sovereign immunity extends to suits "against its officers, agents, and representatives, where the [sovereign], though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387.[38] In *Louisiana* v. *McAdoo*, 234 U. S. 627, 632, the Court, in speaking of suits to review the official action of the Secretary of the Treasury as to the rate which should be exacted under his construction of the Tariff Acts, observed that such suits "would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom and would obviously, in effect, be suits against the United States." We submit that the suit below was one against the United States, since a judgment rendered for the respondent would have a substantial impact upon the financial affairs of the sovereign.

This Court has recently applied the sovereign immunity doctrine in a suit against the Secretary of the Navy to enjoin one aspect of the renegotia-

[38] Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457.

tion process (see *Mine Safety Appliances Co.* v. *Forrestal*, No. 71, this Term, decided December 10, 1945). There the renegotiation order had been issued, and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the district court to enjoin such withholding was held barred by the absence of the United States as a party because the effect of the relief sought would be to compel the payment of money from the Federal Treasury.

Here, judicial aid is sought at a much earlier stage of the same type of proceeding. One reason, if not the principal reason, advanced by the court below for taking jurisdiction, is that the "investigation" to which the respondent might otherwise be subjected "might be followed by the sequestration of moneys due it by the United States on other contracts" (R. 50). But if those fears had been realized prior to the institution of the suit, relief would have been barred under the decision in *Mine Safety*, where the plaintiff also had sought both declaratory and injunctive relief (see slip opinion, p. 1). We know of no principle of law that would permit a plaintiff to obtain relief long prior to the occurrence of a feared event, where that event may never occur, if the same relief would be denied when the threat assumed concrete form.

Nor is there any principle of law which restricts the sovereign immunity, where the suit is nominally against the government officer, to cases where the relief sought would involve payment from the Government treasury. Thus, in *Belknap* v. *Schild*, 161 U. S. 10, the effect of the injunction sought against the official (to prevent patent infringement) would have been to stop the Government's manufacture of an article needed by the Navy. Likewise, in *In re Ayers*, 123 U. S. 443, the injunction would have prevented State attorneys from bringing certain suits for the collection of State taxes. Again, in *Louisiana* v. *McAdoo*, 234 U. S. 627, equitable relief would have prevented the Secretary of the Treasury from collecting less than the alleged legal tariff.

It is recognized that in certain cases the doctrine of sovereign immunity has not barred suits against Government officers, as individuals, for acts alleged to lie outside their constitutional or statutory authority. But we do not think the instant case falls within any of the situations in which an exception has been made to the rules enunciated above. One case in which relief has been granted involves a trespass to property. See *Mine Safety* case, slip opinion, p. 3; see also: *United States* v. *Lee*, 106 U. S. 196; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Philadelphia Co.* v.

Stimson, 223 U. S. 605; *Goltra* v. *Weeks*, 271 U. S. 536. This case obviously does not fall within that category. Another exceptional situation is one in which an allegedly invalid regulation is about to have an impact upon the affairs or the conduct of the plaintiff. Such a situation is exemplified by *Ex Parte Young*, 209 U. S. 123, involving the fixing of railroad rates. This is likewise inapplicable here, since the renegotiation conference cannot possibly affect plaintiff's legal rights (cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41), and a renegotiation order, even if one were issued, is not self-executing.

There is a classification which superficially may seem pertinent—where the disregard of the administrative action, alleged to be unlawful, may result in criminal prosecution. See *Ex Parte Young*, 209 U. S. 123. Here, the statute provides criminal penalties for "wilfully" failing to comply with a "demand" for information. But it is plain that upon the allegations in the complaint, the plaintiff has failed to make out even a colorable case of a threat of prosecution. See discussion, *supra*, pp. 18–20.

The absence of a well-defined precedent to support this type of case, from the standpoint of sovereign immunity, requires dismissal of this suit because of sovereign immunity. Congress has consented to suit to resolve these questions in the Tax Court, and possibly thereafter in the Court

of Claims or the district courts, depending upon the mode of enforcement selected (see discussion, *supra*, pp. 51–53). Congress has not consented to initial review of these questions by declaratory judgment suit in the district court. On the contrary, Congress has carefully sought to bar such jurisdiction by giving the Tax Court exclusive jurisdiction. Cf. *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459. The conclusion for which we argue seems to be compelled here by the consideration that the instant suit halts the renegotiation process not only with regard to the plaintiff and his contracts, but with regard to every other contractor in a similar situation—here, some nineteen shipping companies which conducted some ninety voyages.[39]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

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JANUARY 1946.

[39] H. Rep. No. 2088, 78th Cong., 2d Sess., p. 2.

APPENDIX

UNITED STATES MARITIME COMMISSION,
Washington, September 11, 1945.

THE ACTING SOLICITOR GENERAL,
Washington 25, D. C.

DEAR MR. JUDSON: At the request of your representatives, I am submitting the following information concerning the authority, practice and procedure of the United States Maritime Commission Price Adjustment Board.

Section 403 (f) of the Renegotiation Act of 1942 (Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942) provides that "Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, * * * and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

Pursuant to that provision, the Chairman of the United States Maritime Commission (who under subsection (a) of the Act is a "Secretary" of a "Department") delegated certain powers to the Price Adjustment Board by Administrative Orders establishing and defining the authority of the Board. Copies of these Administrative Orders

are enclosed and made a part of this letter by reference.

Under the authority vested in the Board by these Administrative Orders, it has been the uniform practice of the Board to arrange a conference with the contractor after obtaining information and data, which after being analyzed indicate that "excessive profits" within the meaning of the Act may have been realized by the contractor from contracts with the United States or subcontracts thereunder, as defined in Section 403 of the Act. In the conference the Board attempts to reach an agreement with the contractor as to the extent to which, if at all, profits realized under such contract are excessive, and as to a satisfactory method for eliminating any "excessive profits." If no agreement with the contractor is reached, the Board makes a recommendation in Memorandum form to the Chairman of the Commission that he formally find that "excessive profits" have been realized in the amount believed by the Board to be excessive. In order that the Chairman of the Commission may reach an independent decision in the matter, the Board recites in the Memorandum all of the salient facts and financial data, as well as all other important considerations, upon which its recommendation is based. If any question is raised as to whether the Act applies to the particular contractor or to any of his contracts under review, the Board obtains an opinion from the Legal Division of the Commission, and uniformly makes reference, in the same Memorandum, to such questions as well. These include such mat-

ters as whether a contract was with a "Department" within the meaning of the Act, whether final payment under the contract was made prior to April 28, 1942, whether the contract was completed or terminated in a fiscal year which closed more than one year before renegotiation proceedings were commenced, and similar questions as to application of the Act to the particular person or contract. It is also the Board's practice to draft and submit with its recommendation to the Chairman of the Commission, a proposed "unilateral order" for the Chairman's signature. If the recommendations and proposed order submitted by the Board are approved by the Chairman, the order is signed by him and issued as a unilateral order.

The Board, since its inception, has never issued, or asserted the authority to issue, a unilateral order on its own authority, and the Board has at no time understood the Administrative Orders referred to above as authorizing the Board to do more than to make recommendations to the Chairman of the Commission.

Sincerely,

John R. Paull,
JOHN R. PAULL,
Vice Chairman,
Price Adjustment Board.

Enclosures.

UNITED STATES MARITIME COMMISSION

WASHINGTON

Administrative Order No. 64

To All Employees of the United States Maritime Commission:

For the purposes of carrying out the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, insofar as relates to renegotiation of contracts and subcontracts thereunder and for related purposes, there is hereby created a Board to be known as the "Price Adjustment Board of the Maritime Commission."

The Board shall consist of a Commissioner of the Maritime Commission to be designated by the Chairman of the Commission, a representative of the Division of Finance to be designated by the Director of Finance with the approval of the Maritime Commission, and a third member who shall be selected with the approval of the Chairman of the War Production Board as his representative. Additional members of the Board shall be appointed by the Commission from time to time should it appear advisable. The Commission members shall act as Chairman of the Price Adjustment Board.

The Board is hereby charged with responsibility for bringing about such review of contract and subcontract prices as it may deem to be desirable, renegotiating, or causing to be renegotiated, such contract prices when, in its judgment, such action is necessary or desirable, and making such recommendations to the Commission as may be

appropriate to effectuate the results of such renegotiations.

The Board is also instructed whenever appropriate to function jointly with representatives or agencies of the Navy Department, the War Department, the War Production Board, and other Departments or Agencies of the Government.

To that end, the Board shall have the collaboration of the Commission's Purchase and Supply, Production, Finance, and Legal Divisions, and of such other officers and divisions of the Commission as may be appropriate, and in cases where it appears that costs or profits of contractors or subcontractors are, or may be excessive for any reason, shall initiate and be responsible for suitable action with a view to securing adjustments and refunds. The Board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Commission or by the Chairman of the Commission. The Construction Review and Analysis Section of the Division of Finance, in conjunction with the General Auditor of Construction, will act as fact-finding agency for the Price Adjustment Board, and will, upon the request of the Price Adjustment Board, conduct, or cause to be conducted, investigations into the cost and profits of any contracts or subcontracts in which the Commission is interested.

The Price Adjustment Board, the Construction Review and Analysis Section and the Commission's General Auditor of Construction are authorized to make use of the facilities of the Securities and Exchange Commission, Federal Trade Commission, and other proper departments or

agencies of the Government in securing and assembling information.

The Price Adjustment Board is also authorized to call upon the Cost Analysis Section of the War Production Board to conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, and through the Secretary of the Commission may request the Bureau of Internal Revenue to make available its services, with the approval of the Secretary of the Treasury, for the purpose of making examinations and determinations with respect to profits under such contracts or subcontracts. No audit shall be made pursuant to Executive Order No. 9127 without first advising the Cost Analysis Section of the War Production Board. This provision, however, does not apply to audits made in the normal course of the Commission's business otherwise than pursuant to such Executive Order.

All cost analysis reports and all information obtained from contractors, or otherwise by or for the Price Adjustment Board of the Maritime Commission, shall be available at all times to the corresponding Price Adjustment Boards of the War and Navy Departments and to the War Production Board.

Where contractors have contracts with either or both of the War and Navy Departments, as well as with the Commission, the Price Adjustment Board of the Commission shall agree with the Price Adjustment Board or Boards of the Departments involved as to how and by whom negotiations shall be conducted.

The Board shall keep a written record of each action taken by it. The Board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors.

By Order of the United States Maritime Commission.

(Sgd.) W. C. PEET, Jr.,
Secretary.

MAY 5, 1942.

UNITED STATES MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
August 14, 1942.

By virtue of the authority vested in me by Section 403, Title 4, 6th supplement, National Defense Appropriation Act of 1942 (Public Law No. 528, 77th Congress, approved April 28, 1942), I hereby delegate to the Price Adjustment Board of the Maritime Commission, created by Administrative Order No. 64 of the United States Maritime Commission, dated May 5, 1942 and supplements thereto, all authority, duties and responsibilities therein set forth, provided, that renegotiation agreements shall not become final until approved by said Commission.

(s) E. S. Land,
E. S. LAND,
Chairman.

Delegation of Authority under subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. (Public 528, 77th Congress) approved April 28, 1942, as amended through July 1, 1943, herein referred to as the "Act"

to

Arthur G. Rydstrom, Commander U. S. N. R. for execution of clearance agreements

Whenever, as a result of renegotiation under the Act with a contractor or subcontractor assigned by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission, it shall have been found by at least two members of said Board that no excessive profits have been realized in the period or with respect to the contracts or subcontracts as to which such finding shall have been made, Arthur G. Rydstrom, Commander U. S. N. R., a member of said Board, is hereby authorized to enter into a final or other agreement with such contractor or subcontractor pusuant to subsection (c) (4) of the Act with full authority to execute the same on behalf of the Chairman of the Maritime Commission, representing the other Secretaries hereinafter referred to.

Provided, however,

(1) Nothing herein contained shall be construed as modifying the obligation of the Price Adjustment Board of the Maritime Commission and of the officer executing the final agreement hereunder, to observe and follow the principles,

policies and procedures as established from time to time by the Joint Price Adjustment Board;

(2) The agreements referred to herein commonly known as "Clearance Agreements" executed pursuant to this delegation of authority shall be on standard forms now in use by the Price Adjustment Board of the Maritime Commission and there shall be no substantial deviation therefrom without the prior approval of such Board;

(3) No contractor or subcontractor shall be required to inquire into the validity or regularity of any assignment by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission and the signature of the said Arthur G. Rydstrom on behalf of the Chairman of the Maritime Commission shall be conclusive evidence of his authority to execute such agreements on behalf of the Secretary of the various Departments to which the Act applies;

(4) For the purpose hereof the term "Department" includes within its meaning the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company or the Rubber Reserve Company, as the case may be, and the term "Secretary" includes within its meaning the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration and the Boards of Directors of the Defense Plant Corporation,

the Defense Supplies Corporation, the Metals Reserve Company and the Rubber Reserve Company. The term "Joint Price Adjustment Board" includes within its meaning the Board established by the Secretaries by memorandum dated September 24, 1943.

(5) This delegation of authority to execute clearance agreements on behalf of the various Secretaries is made pursuant to a cross delegation of authority which became effective on October 20, 1943 pursuant to which the authority and discretion so delegated to one of the Secretaries may be exercised by such individuals or agencies within his Department to whom like authority and discretion in respect of contracts with his Department, and subcontracts thereunder, may have been or may thereafter be delegated.

(6) The authority hereby delegated shall be effective as of 12:01 A. M. February 1, 1944 and shall be retroactive to that time and may be revoked or modified at any time thereafter.

EMORY S. LAND,
Chairman of the United States Maritime Commission.

Dated as of February 1, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 435.

EMORY S. LAND, Individually and as Chairman of the United States Maritime Commission, et al., *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 435.

EMORY S. LAND, Individually and as Chairman of the United States Maritime Commission, et al., *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Whether the petition presents a substantial question of general importance that should be settled by this Court.

2. Whether agreements for the charter of vessels entered into by the respondent steamship company with the British Ministry of War Transport, an agency of the British Gov-

ernment, are contracts with a "Department" within the meaning of Section 403 of the Renegotiation Act of 1942, as amended.

3. Whether individuals, who are officials of the United States and who are acting without authority of law, may be enjoined from renegotiating charter agreements entered into between the respondent steamship company and the British Ministry of War Transport.

4. Whether the courts have jurisdiction to enter a declaratory judgment of the rights of the parties in a case of actual controversy involving no question of administrative discretion, and where no adequate or exclusive remedy is provided by statute.

5. Whether the Courts may enjoin administrative officials from renegotiating charter agreements entered into by the respondent steamship company with the British Ministry of War Transport, under the Renegotiation Act, which does not afford an adequate administrative remedy, or any remedy at all, and enter judgment declaring the rights of the parties to the controversy.

STATUTES INVOLVED.

The relevant section of the Shipping Act, 1916, and the Declaratory Judgment Act, are set forth in Appendix A and Appendix B, pages 43 and 44.

STATEMENT OF THE CASE.

This is a suit against the individuals named, as Chairman of the Maritime Commission (hereafter referred to as the Chairman) and his representatives, the members of the Maritime Commission Price Adjustment Board (hereafter referred to as the Board) to restrain them from applying the provisions of the Renegotiation Act of April 28, 1942, c. 247, Title IV, Sec. 403, U.S.C. Title 50 App., Sec. 1191 (56 Stat. 245), as amended by the Revenue Act of 1943, Sec.

701, Public Law No. 235, 78th Congress, 2nd Session, to charter agreements entered into between respondent and the British Ministry of War Transport. The Renegotiation Act authorizes and directs the Chairman to renegotiate contracts with the United States Maritime Commission (hereafter referred to as the Commission) when in his opinion the profits realized or likely to be realized thereunder may be excessive.

On April 25, 1941 and several dates subsequent thereto the respondent entered into charter agreements with the British Ministry of War Transport, an agency of the British Government, (hereafter referred to as the British Ministry) for the charter to it of certain vessels owned by respondent, in accordance with the terms and conditions set forth in the charter agreements attached to the complaint. (R. 5)

The final payment of the agreed charter hire on each vessel was made to respondent under the terms of the charter agreements, on the respective dates specified in the complaint, the latest of which was November 28, 1941, approximately five months prior to the enactment of the Renegotiation Act of 1942. (R. 7) Respondent completed its obligations to the British Ministry under the terms of each of the charter agreements, and said charters were terminated on the respective dates specified in the complaint, the latest of which was January 26, 1942, more than one whole fiscal year prior to the purported commencement of renegotiation of said charter agreements by the Board. (R. 7) The fiscal year of the respondent in 1942 and for many years prior thereto ended on September 30. (R. 4)

On November 26, 1943, the Board representing the Chairman, purporting to act pursuant to the provisions of the Renegotiation Act and the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, promulgating the Purposes, Principles and Policies and Interpretations of such agencies under said Act (R. 33) served upon the respondent by registered mail "Notice of

Initial Conference Under the Renegotiation Act Which Shall Constitute Commencement of Renegotiation." (R. 29) The respondent was directed to appear before the Board on December 13, 1943 for an initial conference and to furnish said Board with certain statements, information and financial data to be used in determining whether respondent had realized excessive profits from its charter agreements with the British Ministry. (R. 30)

Respondent was advised in such notice that if the time fixed for the conference was not satisfactory, the Board would entertain a request in writing "In the form hereto attached" for a continuance to a later date. The form attached to said notice requested a continuance of the initial conference with the Board "in the renegotiation with the undersigned contractor which has been commenced pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended." (R. 32)

On December 13, 1943, respondent filed with the Board a letter denying the authority of the petitioners to require the renegotiation of, or their authority to renegotiate the charter agreements, and denying that such charter parties were contracts with a "Department" as defined in the Renegotiation Act. (R. 39) In addition, respondent asserted that final payment of the charter hire had been made prior to the enactment of the Renegotiation Act, and the charters were completed in a fiscal year ending more than one year prior to the purported commencement of renegotiation.

Thereafter on May 23, 1944, petitioners, by their representatives, notified respondent that: (R. 43)

> "After considerable study of the entire Red Sea operation, I am satisfied that there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable."

It was further stated in said notice of the Board that it

> "would not ask the vessel owners to go to the trouble of furnishing any financial data until I was satisfied

that there was a renegotiable agreement with the Commission."

The notice further stated:

> "In view of the foregoing I suggest a conference at this office, 1200 15th Street, Washington, D. C. * * * at 10:00 A.M. on June 29 with Waterman Steamship Company *for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act.*" (Italics ours).

The notice demanded that respondent submit statements, information and financial data in accordance with a proposed outline attached thereto. This consisted of a document entitled "Statement in Renegotiation" in the *form of an affidavit* in which the officer of respondent executing the same *would make oath*, among other things as follows:

> "(1) that I am an officer to wit.....of..... the Contractor signing Exhibits A and B hereto attached;
>
> "(2) that I am duly authorized to execute this statement on behalf of *said Contractor;*"

Exhibits A and B referred to therein consist of certain general information and financial data regarding the respondent corporation, and voyage data in detail with respect to each of the vessels chartered by respondent to the British Ministry under the so-called Red Sea Charters. (R. 45-48)

On June 27, 1944, respondent filed its complaint herein (R. 2 et seq.) for an injunction and for a declaratory judgment.

On June 28, 1944, respondent filed its motion for a preliminary injunction (R. 48). On July 10, 1944, petitioners filed their Motion to Dismiss (R. 50-51) upon the grounds that (a) the Court lacks jurisdiction over the subject matter of the action, and (b) that petitioners failed to show any injury to respondent, and had failed to exhaust its administrative remedies.

The District Court denied respondent's motion for preliminary injunction and dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (R. 51). On appeal, the Court below reversed and remanded the case to the District Court for consideration of the single question "Were the charter agreements, entered into in 1941 by Waterman Steamship Corporation and the British Ministry of War Transport, contracts with a 'department' within the meaning of Section 403 of the Renegotiation Act of 1942?" (R. 66)

SUMMARY OF ARGUMENT.

I.

The petition presents no substantial question of general importance that should be settled by this Court, since the decision of the Court below will not interfere with the administration of the Renegotiation Act.

II.

Declaratory Judgment is an appropriate remedy for the determination of the rights of the parties to a controversy, even though another remedy may be available.

III.

The Renegotiation Act confers upon petitioners no authority to renegotiate contracts with a foreign government.

(a) The terms of the charter agreements in controversy show they are not contracts with the Maritime Commission.

(b) The Congress, although requested to do so, refused to amend the Renegotiation Act to cover contracts with foreign countries.

IV.

The Courts may intervene to prevent the acts of administrative agencies beyond the scope of their authority.

V.

Neither the petitioners nor the Tax Court have authority to make any determinations, except as to the amount, if any, of excessive profits resulting from the performance of contracts with the Maritime Commission.

VI.

Where an administrative agency has made determinations and issued orders beyond the scope of its authority, such acts are subject to judicial review by Declaratory Judgment, or in equity.

VII.

In order to deprive an equity court of jurisdiction, an administrative remedy must be available, and must be adequate to meet the requirements of due process.

VIII.

The relief granted by the court below will prevent a multiplicity of suits.

IX.

The relief granted by the court below is necessary to prevent irreparable injury to respondent.

ARGUMENT.

I.

The Petition Should be Denied for the Reason That It Presents No Substantial Question of General Importance That Should be Settled by This Court, Nor Does the Decision of the Court Below Conflict with the Applicable Decisions of This Court.

At the outset of the consideration of the question presented by the petition, it should be clearly understood that the charter agreements involved in this controversy are not

"government wartime contracts" as asserted by petitioners (Petitioners' brief p. 10). Therefore, a denial of the petition could have no effect upon the administration of the Renegotiation Act as it applies to contracts entered into with any "Department" as defined in that Act. The charters are contracts with a foreign government, a class of agreements which Congress refused to include within the terms of the Renegotiation Act, notwithstanding that recommendations were made to it for such inclusion.

Petitioners argue that unless they are permitted to apply the Renegotiation Act to contracts entered into by respondent with a foreign government, that the statutory procedure for dealing with the renegotiation of contracts with the departments specified in the Renegotiation Act will be destroyed. They say that the courts may not interfere to prevent the unlawful renegotiation of contracts with a foreign government which has been commenced by petitioners, and which involves an invasion of the rights of the respondent and which, if concluded by unilateral action by the petitioners will deprive respondent of his property by the withholding, without lawful authority, sums which may be due it on contracts with the United States.

The central issue, therefore, is whether a citizen who entered into contracts with a foreign government in 1941, and which have not been subjected to renegotiation by the Congress, is required to stand by helplessly while an administrative agency renegotiates such contracts by carrying out unlawful determinations already made, adversely affecting the interest of the respondent, and whether the respondent is required to comply with the unlawful demands of petitioners for financial statements, data and other information with respect to such contracts.

There is no other instance of record where either of the administrative agencies designated by statute to renegotiate contracts entered into with a "Department", has commenced renegotiation or has attempted to renegotiate contracts which were not entered into with one of the departments specified in such act.

There is nothing in the record to show, and indeed the petitioners do not claim, that the charter agreements were entered into with the Maritime Commission. The petition, therefore, presents no question of general importance involving the administration of the Renegotiation Act and, must be denied.[1]

The effect of the decision below is limited to the fifteen other steamship companies who entered into charter agreements with the British Ministry in the same manner and form and at about the same time that the charters in controversy in this case were entered into. Petitioners' brief (footnote 8, page 10) cites the fact that several of these companies have brought suits to enjoin the renegotiation of such charter agreements and for declaratory judgments.

The two hundred renegotiation cases pending in the Tax Court, cited in footnote 9 on page 11 of Petitioners' brief, all relate to contracts entered into with one of the "Departments" specified in the Renegotiation Act, or to subcontracts entered into thereunder.

Therefore, the decision of the Court below that the respondent herein is entitled to have a declaratory judgment as to whether the charter agreements entered into with the British Ministry are contracts with a "Department" within the meaning of the Renegotiation Act is proper, and will not in the least interfere with the renegotiation of any contract entered into with a "Department" as defined in such Act.

Because Congress has passed no law with respect to the renegotiation of contracts with a foreign government, the petitioners were and are acting without any authority in law, and the question of the substitution of the judgment of the court for that of an administrative agency is not involved. The power of petitioners is circumscribed by the authority granted. *Stark et al.* v. *Wickard*, 321 U. S. 288.

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[1] *U. S.* v. *Rimer*, 220 U. S. 547; *Fields* v. *U. S.*, 205 U. S. 292; *Forsyth* v. *Hammond*, 166 U. S. 506.

Respondent, under the circumstances, had no recourse, except to the courts. There is no question here that is either novel or extraordinary, such as to warrant the granting of the writ. Obviously, the decision below is consistent with the rulings of this Court governing attempts by administrative bodies to exercise power beyond the scope of the authority conferred upon them. The procedure approved in that decision is necessary to the protection of the rights of the respondent on the one hand and to the sound and lawful administration of the Renegotiation Act on the other. Since the record does not support the propositions urged by petitioners, the petition must be denied.

II.

A Proceeding Under the Declaratory Judgment Act is Appropriate for the Determination of the Rights of the Parties to a Controversy Even Though Another Remedy is Available.

It is fundamental that where rights are invaded as they have been here, or immediately threatened, Federal Courts may give relief by either traditional remedies or by declaratory judgment.[2]

Where a declaratory judgment will clarify and settle legal relations in issue and where it will terminate, and afford relief from uncertainty and controversy, it is an appropriate remedy.[3] And it is a remedy which may be granted without regard to the existence of a remedy elsewhere and even in the absence of alleging that "irreparable injury is threatened."[4]

There is here a controversy between parties who face each other in an adversary proceeding. The dispute is definite and concrete. Prior to the suit, the parties had

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[2] *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227.

[3] *Delno* v. *Market Street Railway Co.*, C. C. A. Cal. 1942, 124 F. (2d) 965.

[4] *Aetna Life Insurance Co.* v. *Haworth*, *supra*.

taken adverse positions with respect to the questions in issue.

Respondent's legal and constitutional rights have been and are affected and brought into question by the conduct and threatened conduct of petitioners. The question of legality of the action of petitioners in determining to apply, and in applying the Renegotiation Act to the charter agreements entered into between the respondent and the British Government has arisen between the parties hereto; namely, whether the Renegotiation Act confers upon petitioners authority to apply its provisions to said charter parties and to make the determinations heretofore made and to take further threatened action thereunder. This question is fundamental to all activity of the petitioners with respect to the renegotiation of such charter agreements. Respondent has persistently claimed that petitioners could not rightfully or lawfully determine that the charter agreements between the respondent and the British Government are contracts with the Maritime Commission and subject to the provisions of the Renegotiation Act; that they cannot rightfully or lawfully apply said Act to the charters or do any act or take any steps with respect thereto. Petitioners assert that they are legally authorized by the Renegotiation Act to apply said Act to such charters and have commenced renegotiation and made certain determinations with respect thereto. They have (1) definitely rejected respondent's claim that the charter agreements are not subject to the provisions of the Renegotiation Act; (2) have determined affirmatively that the charter agreements are contracts with the Commission, and (3) that a portion of the profits realized therefrom constitute excessive profits within the meaning of the Renegotiation Act. (R. 43) With respect to such charter agreements, petitioners plainly intend to perform what they consider their duty under the provisions of the Renegotiation Act and will, unless the Courts intervene, determine the portion of the profits resulting from the per-

formance of such agreements, which, in their opinion, constitutes excessive profits within the meaning of the Renegotiation Act. They intend to and will withhold the amount, so determined by them, from sums due respondent on contracts with the United States.[5]

A declaratory judgment in respect of whether the Congress has provided for the renegotiation of the charter agreements entered into between the respondent and the British Government would terminate the controversy between petitioners and respondent and remove all uncertainty between them with respect thereto, and would set said controversy at rest before it leads to a further invasion of respondent's rights. The renegotiation, when consummated by unilateral action of the petitioners, with consequent withholding of large amounts of respondent's monies now due or to become due on contracts which it holds with the United States, would give rise to much involved controversy and litigation, with claims and counter claims over a long period. It would result in a multiplicity of suits in various jurisdictions and put respondent to great expense and cause prejudicial uncertainty in respondent's financial position in respect to its shipping business. The respondent has no remedy or adequate means of relief against, or in avoidance of, the unlawful acts done and threatened, except by intervention of the Courts under the Declaratory Judgment Act or the traditional remedy of injunction.

This case, therefore, presents a controversy between parties having adverse legal interests, of sufficient immedi

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[5] In *Isthmian Steamship Co., Inc.* v. *Land, et al.*, Civil Action No. 29546, referred to in footnote 8, page 10 of Petitioners' Brief, the Board has notified the plaintiff there that it has made a "tentative finding of excessive profit" in the sum of $959,525.74, and under date of June 15, 1945 notified plaintiff that it would be afforded a period of two weeks within which to indicate its agreement or disagreement with such finding. Similar action has been taken against other steamship companies with respect to the Red Sea charters. Actions were brought to restrain further proceedings in renegotiation of such charters.

acy and reality to warrant the entering of a declaratory judgment.[6]

This proposition was recently upheld by the Court in *Spector Motor Service Inc. v. McLaughlin*, decided December 4, 1944, 323 U. S. 101, which was a suit brought in a United States District Court to enjoin the enforcement of a Connecticut State Tax and for a declaratory judgment that the statute did not apply to complainant.

The constitutionality of the statute had not been determined by the Courts of Connecticut with respect to the application of the statute to the business of petitioner. This Court held that a declaratory judgment proceeding was appropriate, stating:

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate * * * *because of the uncertainty surrounding the adequacy of the Connecticut remedy.*" (Italics ours)

The case, therefore, was remanded to the District Court with directions to retain the bill pending the determination of proceedings in the state court.

In *Perkins* v. *Elg*, 69 App. D. C. 175, 99 F (2d) 408 (affirmed 307 U. S. 325), the Court sustained the action of the District Court in granting an injunction and a declaratory judgment as well. In that case the complainant had been born in this country, of naturalized parents and during her infancy taken back to her parents' native land of Sweden. Upon reaching her majority she returned to this country and was given a passport. Later it was found that her father had no intention of again becoming a permanent resident of this country and she was immediately declared to be in the country illegally. She was threatened with arrest and deportation in the event she did not leave the

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[6] *Maryland Casualty Company* v. *Pacific Coal and Oil Company*, 312 U. S. 270; *Brillhart* v. *Excess Insurance Co. of America*, 316 U. S. 491; *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293.

country voluntarily. However, as a matter of grace the threatened action was held in abeyance, but the officials of the Labor and State Departments still maintained that her entry was illegal. She brought suit to enjoin the threatened action on the part of the officials and also for a declaratory judgment, declaring her status as a citizen of the United States. The contention was made there that she had a remedy at law by submitting to arrest and testing the question by a writ of habeas corpus. But the Court of Appeals said:

> "The trial court, as we have seen, concluded that the case was properly brought within the declaratory judgment statute. We are of the same opinion.
>
> "* * * There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. * * * she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights,—certainly no less valuable than property rights,—and an actual and vital controversy exists between her and the government in relation to them."

The only difference in the *Elg* case and the case at bar is the kind of right involved. It is clear, therefore, that where an administrative agency is exceeding its statutory authority or where the remedy provided in the statute is inadequate, a declaratory judgment proceeding is proper.

III.

The Charter Agreements Entered Into by the Respondent with the British Ministry of War Transport are not Contracts with a Department Within the Meaning of Section 403 of the Renegotiation Act of 1942, as Amended.

(a) The terms of the charter agreements show they are not contracts with the Commission.

If the charter agreements are not contracts with the Maritime Commission, there is no law governing their renegotiation, and the commencement of renegotiation on November 26, 1943 was outside the authority of the petitioners, under the Renegotiation Act, dealing with Government contracts.

This case came before the District Court upon a verified complaint and motion to dismiss. Thus, "accepting the allegations of the complaint as true, as for the present purposes we must,"[7] the question presented on the record is whether the charter agreements between respondent and the British Ministry are contracts with the Maritime Commission. This is a question of law which can be decided only by the courts.[8]

The charter agreements were for the hire of the vessels of respondent only for outward voyages to the Red Sea area. Each such agreement provides that:

> "It is this day mutually agreed between *Waterman Steamship Corporation*, owners of the Steamship .....of.....tons net register, classed First Class American Bureau of Shipping now trading *and British Ministry of War Transport* Charterers, as follows:" (R. 18) (Italics ours).

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[7] *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 414.

[8] *Newport News Shipbuilding and Drydock Company* v. *Schauffler*, 303 U. S. 54, 57.

The charters then proceeded through 28 articles to set the terms of the agreements. They were signed in the names of the respondent by its proper officials and by the representative in the United States of the British Ministry.

Rates are provided for the space of each vessel. The British Ministry has the right to change the discharge ports within certain ranges, and provision is made for appropriate adjustments in the charter hire in such cases with refunds where required, payable to the British Ministry. That agency is required to load, stow and trim the cargo at its own expense and to pay the cost of discharging the cargo, along with port charges incidental thereto. The British Ministry has the right to cancel the charter party if the vessel shall not be ready to load at the time designated, and provision is made for payment of demurrage charges to the respondent for delays in loading and discharging cargo. (R. 20, 21)

The charters provided (Article 25) that the British Ministry has the privilege of securing commercial cargo to fill out space in the vessel and that the revenue from such cargo shall be credited to the British Ministry. (R. 27)

Article 28 provides that the charter shall not become effective until approved by the Commission, and that any dispute arising under the charter shall be settled by the Commission. (R. 27)

The form of the charter agreements, their execution and submission to the Commission for approval conform to the long-established requirement of law with respect to the chartering of vessels to aliens.[9] If the charters had been entered into with the Commission, their approval would not have been required by law. Furthermore, the provision that disputes between the parties to the agreements shall be settled by the Commission negatives the suggestion that that agency was a party to the agreements.

The Commission could not have maintained an action against respondent for breach of its charter agreements

[9] Act of Sept. 7, 1916, c. 451, Sec. 9 (39 Stat. 730, as amended) U. S. C. Title 46, Sec. 808 (App. A, p. 43).

with the British Ministry. Neither could respondent maintain an action against the Commission for failure of the British Ministry to meet its obligations under the charters. In the absence of this mutual right the assertion that the charters are contracts with the Commission cannot be supported. For as the Court has said:[10]

> "In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded."

The non-governmental character of these charters is not only evidenced by the provisions of the charters themselves, but is also made clear by the fact that they do not contain certain provisions which all United States Government contracts are required by law or Executive Order to contain. The Act of April 21, 1808, c. 48, Sec. 3 (2 Stat. 484), as amended, U. S. C. Title 41, Sec. 22, which was in effect at the time the charters were executed, provides that there shall be inserted in every contract or agreement made or entered into on behalf of the United States an express provision that no member of or delegate to Congress shall be admitted to any share or part of such contract or to any benefit to arise thereupon. None of the charters involved in this controversy contains any provision such as that required by that statute.

Executive Order No. 8802, dated June 25, 1941 (6 F. R. 3109) provides in part that all contracting agencies shall "include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color or national origin." None of the charters being considered here, which was executed after the effective date of this Executive Order, contains the provision required by that order to be inserted in government contracts.

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[10] *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421

The United States Government frequently approves agreements between third parties, indeed often undertakes to establish the terms and conditions under which other parties may contract, and to counsel and advise in connection with private contracts without in any way assuming a contractual obligation thereunder.

This is well illustrated by the decision of the Court in *United States* v. *Algoma Lumber Company, supra.*

In that case, Congress provided[11] that the "timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct." Acting under authority of that statute, the Superintendent of the Klamath Indian School, Klamath Agency, Oregon, received bids made by Algoma Lumber Company. Thereupon, a contract was prepared between the Superintendent of the Klamath Indian School and Algoma Lumber Company which was submitted to and approved by the Assistant Secretary of the Interior.

The contract provided that disputes arising thereunder should be determined by the Secretary of the Interior. Payments required to be made under the contract were made to the Superintendent of the Klamath Indian School and were by him remitted to the United States Treasury for the use and benefit of the Indians. The contract reserved to the Commission of Indian Affairs the right periodically to adjust the contract price.

A controversy arose as to whether certain increases in the contract price which were made by the Commissioner and paid under protest by the company exceeded the prescribed limits for such price increases established by the contract. Thereupon, the company brought suit in the Court of Claims for a refund on the theory that the contract on which the alleged overpayments were made was a Govern-

[11] Act approved June 25, 1910, c. 431, Sec. 7 (36 Stat. 857) U. S. C. Title 25, Sec. 407.

ment contract and that the Court of Claims could entertain suit thereon. The Court of Claims found that overpayments had in fact been made and held that plaintiff might recover the amount thereof.[1]

On the Government's appeal, the Supreme Court reversed the Court of Claims, holding that the contract in suit was not a Government contract but was one with the Indians, notwithstanding the fact that the manner of sale was prescribed by the Secretary, the contracts were executed by the Superintendent and approved by the Secretary and the prices of lumber were fixed by the Indian Commissioner. Speaking for the Court, Mr. Justice Stone said: (pp. 421-2)

> "Neither the United States nor any officer purporting to act on its behalf is named a party to the contract. By its terms the contract is declared to be entered into 'between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part' and the Lumber Company, 'party of the second part'. It is thus upon its face the contract of the Klamath Indians executed by the Superintendent, acting as their agent. * * *
>
> "Respondents point only to Sec. 7 of the Act of 1910 and the Regulations prescribed under it as compelling a different result. They argue that the requirements that the manner of sale be prescribed by the Secretary, that the contracts be executed by the Superintendent and approved by the Secretary, and that the prices of lumber be fixed by the Indian Commissioner, indicate a purpose to make the United States, acting as guardian or trustee of the Indians through the Secretary and Superintendent, the contracting party. But, as we have said, all that was done by the government officials in supervising the execution of the contracts and their performance was consistent with the exercise of its function as protector of the Indians without the assumption by the United States of any obligation to the purchasers of the timber, and no implied obligation on its part arises from the performance of that function."

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[1] 86 Ct. Cl. 226

The contract in that case and the circumstances attending its negotiation, execution and approval presented a very much stronger argument in favor of its being a contract with the United States than with respect to the charter agreements between the respondent and the British Ministry. In approving the charters, the Commission was merely exercising the function of controlling the chartering of American-flag vessels to aliens. It did not execute the contract, a fact which, in the *Algoma* case, precluded the enforcement against the Government of any contractual claim.

Petitioners have not attempted to controvert these facts. Indeed, they must be taken as admitted by the motion to dismiss. The Court must find from the record that as a matter of law, the charter agreements between the respondent and the British Ministry were not contracts with the Commission. That fact precludes the exercise by petitioners, with respect to these charters, of powers vested in the Chairman by the Renegotiation Act in respect to contracts with the Maritime Commission.

(b) The Congress refused to amend the Renegotiation Act to cover contracts with foreign countries.

In enacting the Renegotiation Act or in amending it, Congress might have provided that the test of whether a given contract is to be subject to renegotiation would be (a) whether the United States is interested in the contract, or (b) whether the United States approves it as to form, or (c) whether the contract price is set by the United States, or (d) whether the contract is related to the prosecution of the war, or (e) whether the contract is financed by means of United States Government funds. But Congress did not prescribe any of those tests; the test prescribed by Congress in the original Renegotiation Act and through four successive amendments thereof is whether a contract is one *with a department*, as that term is defined in the Act.

Before the renegotiation proceedings had been instituted by the petitioners with reference to the British Government contracts involved in this case, it was recommended by the Committee on Naval Affairs of the House of Representatives that contracts of American firms with the Allied governments, the financial obligations under which had been assumed by the United States, pursuant to arrangements between such governments and the United States, acting in accordance with the Lend-Lease program should be subjected to renegotiation.[13]

To carry out this recommendation, the Chairman of such Committee introduced a bill in the House of Representatives, September 22, 1943, which was referred to the Committee on Ways and Means.[14]

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[13] House Report No. 733, 78th Congress, 1st Session, pp. 25, 26. The Report states:

> "During the course of the investigations made by the Committee, our attention was also directed to a group of lend-lease contracts which appear to be at the present time outside of the scope of renegotiation. *Prior to our entry into the war, the British and other Allied Governments in 1940 and 1941 placed large orders with many American firms for war material.* These contracts were subject to the same uncertainties of cost that have characterized the war contracts entered into by the War and Navy Departments. * * * *We think that the law should be amended so as to subject this group of contracts to renegotiation.*" (Italics ours.)

[14] H. R. 3316, 78th Congress, 1st Session. Section 11 provided for the amendment of Section 403(k) of the Renegotiation Act to read in pertinent part, as follows:

> "(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, Rubber Reserve Company, the Department of Agriculture, the War Shipping Administration, and to contracts with any foreign government, or any agency thereof, described in section 403 (i) (1) (i) hereof. * * *"

The amendment [illegible] section 403 (i) (1) (i) (Section 10 of the Bill) provided for re[illegible]ation of contracts with any foreign government or agency thereof where any department or any other agency of the United States acquires the interest of any foreign government in a contract entered into by such foreign government with a contractor doing business in the United States. The provisions

Although the Ways and Means Committee recommended a great number of amendments to the Renegotiation Act, which (with modification) were enacted by the Congress on February 24, 1944, the recommendations of the Naval Affairs Committee were not enacted into law. The statute, as so amended, retained in effect the basic requirement that a contract be one *with a department* before the Renegotiation Act could lawfully be applied to it. By failing to extend the Renegotiation Act to British Government contracts financed by the United States through advancements under the Lend-Lease program, although it was requested so to do, Congress clearly indicated its intention that the Act should not apply to such contracts.[17]

In this connection the comment of the Court in *Maschauer v. United States*, 324 U. S. 49, would seem to be controlling. There the Court said:

> "Congress' adoption of statutes providing for the renegotiation of war contracts indicates that in certain instances the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court."

We are not dealing here with a case involving contracts with a "Department" where respondent "has merely been requested to present certain information at an initial renegotiation conference" as suggested by petitioners. The petitioners have commenced renegotiation and have made

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of the bill did not even include the Red Sea Charters. No agent of the United States acquired the interest of the British Government in such charters.

[17] The charter hire was paid by the Maritime Commission, pursuant to an arrangement between an agency of the United States and an agency of the British Government "with respect to payments required to be made by the British Ministry of War Transport under the form of charter party prepared by the Maritime Commission * * *." (R. 28) Respondent was not a party to, nor was it consulted with respect to, such arrangement, and took no part in the discussions leading to its consummation. (R. 7)

certain determinations, and have notified the respondent of the same. The Board, representing the Chairman, on November 26, 1943 commenced renegotiation by mailing to the respondent, by registered mail, a "Notice of Initial Conference Under the Renegotiation Act Which Shall Constitute Commencement of Renegotiation." (R. 29)[16]

It was suggested in the notice that an application for the continuance of the conference to a later date would be considered by the Board. The form of application for continuance, attached to the notices, contained a request for the continuance of the initial conference with the Board "in the renegotiation with the undersigned contractor *which has been commenced pursuant to Section 403*" etc. (Italics ours) (R. 32). It was also suggested in the notice that respondent might state reasons why the Red Sea Charters were not subject to renegotiation (R. 31).

The respondent on December 13, 1943, the date set for the initial conference, filed a letter with the Board denying the authority of the Board or the Chairman to renegotiate the charter agreements for the reason, among others, that they were entered into with the British Government and were not contracts with the Commission.[17] (R. 39 et seq.) Respondent refused to furnish the information and financial

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[16] Section 403 (c)(4) provides: "The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding." App. C, p. 27)

[17] The Chairman has determined that contracts with the Commission are not subject to renegotiation if final payment, pursuant to such contract was made prior to April 28, 1942 and that "payment will be deemed to have been made although relatively small unliquidated items may not have been finally determined and paid for". (R. 36) The Chairman has also determined that the term "completion * * * of the contract" means final delivery or acceptance under the contract and the fact that there may be unliquidated items outstanding, does not extend the time of completion beyond date of final delivery or acceptance. (R. 37) If the charters in controversy were contracts with the Commission they would be exempted by these determinations of the Chairman made pursuant to Section 403 (c)(6)(i). (Unnumbered paragraph of Section 403 (c)(6)(iii), Appendix C, pages 11 and 12)

data demanded by the Board in such notice.[18] Respondent was notified by letter dated May 23, 1944 (R. 43) of the determinations heretofore referred to on pages 4 and 5 of this brief. Therefore, the petitioners' statement in their brief (footnote 10, page 12) that nothing in such letter altered the original invitation to respondent to state reasons why the Red Sea Charters were not subject to renegotiation, is clearly erroneous.

Petitioners attempt to escape the legal effect of notice of such determination by asserting that it was merely an expression of the personal opinion of the Board's counsel. The letter was on the letterhead of the United States Maritime Commission and was signed "Kenneth F. Clark, Price Adjustment Board". The notice fixed a time and place for a conference to be held, not for the edification of Mr. Clark, but for the serious purpose "of determining what portion of the profits" is excessive within the meaning of the Act (R. 44).

The petitioners suggest that the suit is premature because of the possibility that the Board and the Chairman may eventually reverse themselves and make a correct decision that the charters are not contracts with the Commission.[19] That is contrary to the holding of this court under

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[18] Respondent had no contracts with the Commission during the years 1941 and 1942, as petitioners are aware.

[19] The Court may take judicial notice of hearings before a Congressional Committee with respect to the subject matter involved in pending litigation. That the Chairman has formed an opinion that excessive profits were realized, with respect to the Red Sea charters is shown by his own statements in the Hearings before a Sub-committee of the Committee on the Merchant Marine and Fisheries, House of Representatives, 78th Congress, 1st Session, pp. 10 and 13. The Chairman advised the Sub-committee that notwithstanding the fact that the charter rates were at least 25 percent under the going commercial rate at the time, in his opinion, the rates were excessive and the owners had been requested to make a voluntary refund of a portion of the charter hire. He informed the Committee that he had advised certain owners, of which respondent was one, that "from our investigation we are convinced that the rates were too high, and exceedingly so * * *."

facts almost identical with those in this case.[20]

The rendition of a decision on the merits in this case will not make "available to war contractors a means of effectively halting renegotiation proceedings at the threshold for substantial periods of time * * *" (Petitioners' Brief, p. 10), but will rather induce the departments to confine themselves to the task to which the Congress has appointed for them, namely, the renegotiation of contracts entered into with the departments specified in the Renegotiation Act.

IV.

Judicial Intervention is Proper When the Petitioners Have Already Acted by Illegally Setting in Motion Administrative Machinery not Applicable to Respondent's Charters with the British Government.

It clearly appears that the renegotiation of the charter agreements between respondent and the British Government, commenced by petitioners on November 26, 1943, is without authority of law and in defiance of the wishes of Congress. But the Board, nonetheless, has determined that the respondent realized excessive profits. If the charters are subject to the provisions of the Renegotiation Act, petitioners are required by law to withhold sums due respondent from the United States in the amount determined by them to be excessive profits. Under petitioners' argument, respondent must submit to such violation of the law; must permit money to be wrongfully taken away from it, and

[20] *Trust Company* v. *Schnader*, 291 U. S. 24 (See also 293 U. S. 112). The Court said: "* * * However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity."

must file a petition in the Tax Court for a redetermination of the irrelevant question of how much excessive profits were realized by it.

Whether, in deciding the case, the Tax Court would venture beyond the single question which the Renegotiation Act authorizes it to consider (the amount of excessive profits) is problematical, but since that Court has no authority under the Act to render money judgments, and since the Board's determination would have already been enforced,[21] it is clear that completion of the Tax Court proceedings would not finally determine the issue. If the respondent still had resources to litigate further, petitioners argue, it could then bring an action in some Federal court to recover the money which had been wrongfully taken away from it, and only at that stage would the petitioners concede that the case was ripe for a judicial decision of the sole question at issue, namely, had Congress subjected the charters entered into with the British Ministry to renegotiation.

Such a suit would no doubt be met with the defense that the provisions of the Renegotiation Act conferring exclusive jurisdiction to finally determine the amount, if any, of excessive profits, and providing that such determination shall not be reviewed or redetermined by any other court or agency, constitutes in effect a withdrawal of the consent of the United States to be sued for the recovery of monies so illegally withheld.

A similar argument was rejected by the Court in *Stark, et al.* v. *Wickard*, supra.[22] The Court stated:

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[21] Sec. 403 (e)(1) of the Renegotiation Act provides that the filing of a petition in the Tax Court shall not operate to stay the execution of the determinations made by the Chairman. (App. C. p. 38)

[22] In the *Stark* case the Secretary of Agriculture attempted to withhold certain sums owing to the plaintiffs from third parties under color of the Agriculture Market Agreement Act of 1937, and the plaintiff sought to enjoin such Act as being in excess of the authority conferred upon the Secretary by such Act.

"Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. *When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.* (Authorities) *This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.* Cf. *United States* v. *Morgan*, 307 U. S. 183, 190-191. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons *or by the exertion of unauthorized administrative power.* (Italics ours.)

"It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objecton there are adequate answers.

> • • • Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case. *Cf. Landis* v. *North American Co.*, 299 U. S. 248. Should some provisions of an order be held to exceed the statutory power of the Secretary, it is well within the power of a court of equity to so mold a decree as to preserve in the public interest the operation of the portion of the order which is not attacked pending amendment."[23]

The Administrative Machinery Established by the Renegotiation Act is Limited to a Determination of Whether Excessive Profits Exist with Respect to any Contract with a "Department", and the Amount Thereof.

The Renegotiation Act and its legislative history show conclusively that Congress intended to confer jurisdiction upon the Tax Court only to redetermine the amount of excessive profits.[24]

If the Congress had intended that the Tax Court have jurisdiction to determine questions presented in this case, it would have provided for a review by the courts of decisions of the Tax Court in the same manner as is provided for a review of the decisions of that Court with respect to a redetermination of tax deficiencies in order to afford ade-

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[23] See also *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *Philadelphia Company* v. *Stimson*, 223 U. S. 605, *Waite* v. *Macy*, 246 U. S. 606.

[24] The Committee on Ways and Means, of the House of Representatives, in its report upon the Revenue Bill of 1943 (Report No. 871, House of Representatives, 78th Congress, 1st Session) stated, with reference to the duties of the Tax Court:

> "Under existing law there is no right to appeal or review whereby the contractor may have the *question of his excessive profits redetermined*. • • • (Italics ours.)
>
> "The Tax Court of the United States is peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose."

quate opportunity to secure judicial protection against arbitrary or unlawful action.[25]

No such provision was included in the Act. This was in accord with previous judicial precedent with respect to similar situations as exemplified in *In Re Fassett*, 142 U. S. 479. That case was before the Court on petition for a writ of prohibition to prohibit the District Court of the United States for the Southern District of New York from further

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[25] In course of the passage of the Tax Court provision a requirement that the Tax Court make findings of fact was eliminated. The bill as introduced to and passed by the House contained a requirement that in a renegotiation matter, the Tax Court should be under the duty of complying with section 1117(b) of the Internal Revenue Code (26 U. S. C. A. 1117(b)).

(H. R. 3687, Sec. 701(b), amending Section 403(c) of the Sixth Supplemental National Defense Appropriation Act of 1942 (the 1942 Renegotiation Act), pages 119-122 of the bill as printed in the House, 78th Congress, 1st Session.)

Section 1117(b) provides:

> "It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions."

As indicated at page 83 in the Conference report, House Report No. 1079, 78th Congress, 2nd Session, the conference recommended that the provision of the Court of Claims as a forum for renegotiation cases be eliminated and that the Tax Court be restored as a forum.

> "except for the reference to Section 1117(b) of the Internal Revenue Code, imposing upon the Tax Court and each of its divisions the duty to include in its report upon any proceeding its findings of fact, or memorandum opinion and requiring such report to be in writing."

The rules of the United States Court of Appeals for the District of Columbia (Rule 36(b)(1)) relating to review of the decisions of the Tax Court, require that the Clerk of said Court transmit copy of the findings of fact and conclusions of law. Congress is presumed to have been aware of this requirement. The specific elimination of the provision that the Tax Court include in its report findings of fact would seem to be conclusive that the Congress did not intend for the Tax Court to decide questions which were otherwise subject to review by the courts.

proceeding on a libel for seizing a vessel and to obtain the delivery of the same and for damages. Fassett, as Collector of Customs, had forcibly taken possession of a yacht and deprived the owner of the use and control over her, and detained her for the enforcement of the payment of customs duties under the Tariff Act upon the claim that the yacht was an article imported into the United States. The yacht had been purchased in England and was later brought to the Port of New York. Upon her seizure by the Collector, the owner filed a libel against the yacht and the Collector, alleging that the seizure was illegal and wrongful for the reason that the yacht was not an imported article within the meaning of the Customs and Tariff Laws of the United States.

Section 14 of the Customs Administrative Act of June 10, 1890 (26 Stat. 131) provides that the decision of the Collector as to "the rate and amount" of duties chargeable upon imported merchandise is final and conclusive, unless the owner or importer within the time prescribed took steps to have the decision reviewed by the Board of General Appraisers.

The decision of this Board is made final and conclusive except, when under the provisions of Section 15 of the Act, an application for review shall be filed in the Circuit Court of the United States. The statute specifically provided that application may be made to that Court for a review of the questions of law and fact involved in the decision of the Board of General Appraisers. Upon the evidence taken by that Board and upon further evidence if given, that Court is to hear and determine such questions of law and fact "respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." The Court in denying the Writ of Prohibition said: (p. 487)

> "The libellant has no other remedy than the filing of this libel. * * *
>
> * * * *
>
> "The appeal provided for in section 15 brings up for review in court *only the decision* of the board of general

appraisers *as to the construction of the law, and the facts respecting the classification* of imported merchandise, *and the rate of duty* imposed thereon under such classification. *It does not bring up for review the question of whether an article is imported merchandise or not;* nor, under section 15, is the ascertainment of that fact such a decision as is provided for. The decisions of the collector from which appeals are provided for by section 14 are only decisions as 'to the rate and amount' of duties charged upon imported merchandise, and the decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector has no authority to make a determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the district court, on which the rights of the libellant depend. (Italics ours)

"Under the Customs Administrative Act, the libellant, *in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise*, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect, and thus estop himself from maintaining the fact which he alleges in his libel, that she is not imported merchandise." (Italics ours)

This case describes the exact situation presented here.

The administrative agencies to which petitioners refer were set up for the purpose of determining *the amount* of excessive profits resulting from contracts with specified government departments and no other. They have exclusive jurisdiction for that purpose, and the decision of the Tax Court with respect to that is not subject to review.

In order to avail itself of the administrative procedure in the Renegotiation Act, respondent must concede that it

is a contractor with the Commission with respect to its charters with the British Government, thereby placing it in the position of alleging that its charters are subject to the provisions of the Renegotiation Act and asking the Tax Court to find that they are not subject to such provision. A mere statement of that proposition ought to be sufficient to refute the claim of petitioners herein and to show that the principal question involved in this case cannot be raised before or decided by the Tax Court.

VI.

The Determinations and Demands of the Petitioners are Void as Having Been Made Without Authority of Law and Respondent is Entitled to Equitable Relief.

Petitioners argue, and the District Court, in dismissing the complaint held that here no order has been issued in this case which brought it within the rule of *Skinner & Eddy Corp. v. United States*, 249 U. S. 557. (R. 51)

The rejection of respondent's claim that the charters are not subject to the Renegotiation Act, the determination that "there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable" and the requirement that statements, information and data be furnished clearly constitute an order. If the charters are subject to the provisions of the Renegotiation Act, the respondent may not lawfully refuse to furnish statements of actual cost and such other financial data as the petitioners may require. The reason it may not refuse is that the petitioners have, in effect, *ordered* the submission of such statements.[26] It is obviously incorrect

[26] Subsection (e) of Section 403 of the Renegotiation Act of 1942 provides that the Secretary of each department shall have the right to *demand* of any contractor who holds contracts "with respect to which provisions of this section are applicable", statements of actual costs and such other financial statements, at such time and in such form and in such detail as he may require. Willful failure or refusal to furnish any statement required subjects the contractor to criminal penalties.

to state that no order of any sort has been issued to the respondent herein. The petitioners have demanded that the respondent furnish statements, information and financial data on the erroneous determination which has been made that the charters involved herein are contracts "with respect to which the provisions of this section (Renegotiation Act) are applicable." That is an "order." Moreover, it is a final order with respect to the matter of furnishing the information demanded. Refusal of the respondent to comply with it, if lawfully issued, is punishable by a severe fine or imprisonment, or both. It is void *ab initio* and equity may relieve against it.

The Renegotiation Act of 1942 does not authorize the issuance of any "orders" *except* to the extent that it confers upon the secretaries the right "to demand" (to order) the submission of financial data and other statements. If the demand to furnish financial statements and other data under penalty of criminal punishment is not an order, then it is difficult to understand when an order ever would be said to have been made under the Renegotiation Act of 1942.

The determinations and orders made here are even stronger than that which was successfully challenged in *Shields* v. *Utah Central Railroad Company*, 305 U. S. 177. The Court held that an administrative "determination" which had the effect, if validly made, of subjecting the respondent to the requirements of the Railroad Labor Act was subject to judicial review in equity.[27]

In *Skinner & Eddy Corporation* v. *United States*, *supra*, we find the exact situation which is before the Court in this case. The Court held that an order of the Interstate Commerce Commission was void because it exceeded the statutory powers of the Commission and that the Courts have jurisdiction to enjoin the enforcement of the order even though the plaintiff *had not attempted to secure redress in a proceeding before the Commission.*

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[27] See also *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56.

No order at all was issued in *American School of Magnetic Healing* v. *McAnnulty*, supra, directing anyone to refrain from conducting business by mail. No order was issued in *Waite* v. *Macy*, supra, requiring *anyone to refrain* from importing tea. In those cases, the determinations were not directed to the complainants. They were directed to and purported to govern the activities of administrative officials in carrying out duties created by the statute.

But here we have an order directed to the respondent which denies an exemption from the terms of a statute;[28] it subjects respondent to a statutory command compelling conduct on its part in the submission of the data in the form and detail demanded by petitioners, failure to comply with which entails threats of oppressive penalties. Therefore, "the road to the Court's jurisdiction seems to be clear."[29]

VII.

The Doctrine of the Myers Case is not Applicable, Because the Statute Under Consideration There Provided Adequate Administrative and Judicial Remedies.

The petitioners argue that respondent is not entitled to equitable relief because it has not exhausted the administrative remedy provided in the statute. The Court below correctly held that no adequate remedy is available under the Renegotiation Act to determine the questions presented here. The petitioners rely upon *Myers* v. *Bethlehem Shipbuilding Corporation*, supra, and other cases of similar import, to support their contention that the respondent must first comply with the administrative procedure prescribed in the Renegotiation Act before seeking relief in the Courts. The decisions in those cases are not applicable to the facts

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[28] *United States* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 234 U. S. 476.

[29] *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125.

here.[30] Those decisions are in keeping with the established principle that where administrative officers are acting within the authority conferred upon them by a valid statute, the complainant must exhaust the administrative remedy prescribed therein. But the administrative remedy must be an adequate one.[31]

In the *Myers Case*, *supra*, as well as in the other cases on this point cited by petitioners, the statutes under consideration gave the respective administrative agencies no authority to enforce their orders except by Court proceedings, in which all appropriate defenses could be raised.[32] In none of the cases cited by petitioners did the administrative agency involved have authority to make determinations without a hearing, or to withhold monies due complainant without a hearing, or to enforce demands for statements, financial data and other information, without resort to judicial process.

In the case at bar, the Court is dealing with a statute which gives neither the petitioners nor the Tax Court jurisdiction over the charter agreements in controversy.

The Tax Court is not a court in the usual sense of the word. It is described by statute as "an independent agency in the executive branch of the government".[33]

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[30] Appendix A and Appendix B, attached to petitioners' brief, except Administrative Order No. 64, appearing at page 27 thereof, are not a part of the record of this case, and will not be considered by the Court. However, the petitioners may not confer upon themselves, by the device described in such exhibits, authority which was not delegated to them by the Congress. The procedure outlined can relate only to contracts with a department.

[31] *Nelson* v. *First National Bank of Sioux City*, 42 F. (2d) 30; *Gilchrist* v. *Interborough Co.*, 279 U. S. 159.

[32] The Chairman is not required by the Renegotiation Act to invoke the aid of Federal Courts to compel obedience to his demand for information and financial data. He may make a unilateral determination and withhold monies without any resort to the Courts.

[33] 53 Stat. 158, 26 U. S. C. 1100 (derivation: Act of June 2, 1924, c. 234, Sec. 900, as added by Act of Feb. 26, 1926, c. 27, Sec. 1000, 44 Stat. 105.

That it is an administrative agency, and not a court has also been decided by the Courts.[34] And only recently the Supreme Court characterized the Tax Court as an administrative tribunal and stated that "every reason ever advanced in support of administrative finality applies to the Tax Court."[35] The Court was careful to point out that the statute creating the Tax Court provided for judicial review of its decisions with respect to its redetermination of a tax deficiency. The Renegotiation Act, as we have shown, does not provide for a determination by the Tax Court of the question involved in this case, and contains no provision for review of its decisions, therefore there is not "an adequate opportunity to secure judicial protection against arbitrary action."

The principle that the remedy upon its face must be adequate to meet the requirements of due process, in order to deprive an equity court of jurisdiction before such remedy is exhausted, was recently reaffirmed by this Court in *Yakus* v. *United States*, 321 U. S. 414. In that case petitioners had not availed themselves of the procedure set up by the Emergency Price Control Act, by which persons subject to the maximum price regulations might test its validity. It was contended by petitioners that the administrative procedure was inadequate, but the Supreme Court overruled this contention in view of the fact that

> "The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any precedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioner could not throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, *and secure its full*

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[34] *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 279 U. S. 716.

[35] *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. 489.

judicial review by the Emergency Court of Appeals and this Court." (Italics ours.)

And the Court stated in line with previous decisions that

> "Only if we could say in advance of resort to the statutory procedure *that it is incapable of according due process* to petitioners *could we conclude that they have shown any legal excuse for their failure to resort to it* or that their constitutional rights have been or will be infringed." (Italics ours.)[36]

That a remedy at law is neither certain nor adequate is apparent upon the face of the statute under consideration here. The Chairman, by simply applying the economic sanctions provided in the Act is able to enforce his unlawful determinations prior to any hearing or a judicial review.[37]

Applying the principles enunciated there to the statute in this case, it is evident that since there is no provision for judicial review which satisfies the requirements of due process, the respondent by following the procedure provided in the statute is without any legal remedy at all.

In the most favorable aspect of petitioners' contentions, whether the respondent could ever obtain relief at law is a matter of speculation. In no view can it be maintained that there exists a plain, certain, adequate and complete remedy at law in the absence of which respondent is entitled to relief in equity.

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[36] See *Bradley v. Richmond*, 227 U. S. 477; *First National Bank v. Weld County*, 264 U. S. 450; and *Anniston Manufacturing Company v. Davis*, 301 U. S. 337; *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 309; *Minnesota Ex Rel. Pearson v. Probate Court*, 309 U. S. 270, 277.

[37] This is just the type of procedure denounced by the United States Court of Appeals for the District of Columbia in *Hines v. United States, ex rel. Marsh*, 70 App. D. C. 206, 105 F. (2d) 85.

VIII.

Where a Multiplicity of Actions is the Only Alternative, the Intervention of Equity is Justified.

The nature of the contracts respondent has with various agencies of the United States, on account of which the Chairman might withhold or cause to be withheld, sums which he determines to be excessive profits realized under the charter agreements in question, are such that a multiplicity of suits in different jurisdictions would be necessary in an effort to recover the amounts so withheld, assuming that the remedy would be available to respondent. It may be necessary for respondent to bring actions upon numerous contracts, some of which may be cognizable in the Court of Claims and others in the United States District Courts sitting in Admiralty. Respondent, therefore, if denied the remedy granted by the Court below will be subjected to the burden of a multiplicity of actions and of litigating with agencies of the United States Government which have no direct interest in this controversy. This alone is adequate to sustain equity jurisdiction.[38]

As the Court said in *Ex Parte Young, supra:*

> "It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity."

Moreover, were respondent remitted to numerous suits in order to recover amounts withheld by petitioners, the expense thereof would be such as to make the remedy elsewhere inadequate and the damage irreparable. Thus, in *Allen* v. *Regents*, 304 U. S. 439, the Court pointed out:

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[38] *Wilson* v. *Illinois Southern Railway Co.*, 263 U. S. 574; *Union Pacific Railroad Co.* v. *Board of County Commissioners*, 247 U. S. 282; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393; *Ex Parte Young*, 209 U. S. 123.

"And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claims for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity."

It is submitted, therefore, that respondent should not be turned to other proceedings where the remedy is inadequate and the expense thereof would be so great as to constitute irreparable injury.

IX.

Money Withheld and Covered Into the Treasury is Beyond Reach of Any Suit at Law.

Once the money which may be withheld by petitioners on account of contracts between respondent and the United States, is turned into the Treasury and mingled with the general funds, it is by no means clear that respondent could ever effect a recovery thereof.[39]

That the danger is real is manifest from the Court's decision in *Robinson, et al.* v. *Beal, et al.*, 79 U. S. Apps. D. C. 241, 145 F. (2d) 382, 384, where the Court stated:

"The fact that the fund in the *Haskins Bros.* case was derived from the imposition of a tax, while here it was from the imposition by Act of Congress of a condition to the sale of cotton produced in excess of allotment, is of no consequence. The controlling principle is based upon the presence of the fund at the time of suit in the Treasury. The fact, found by the District Court, that 'there is no congressional authority for withdrawal of money from the Treasury under the pool appropriation

[39] The Renegotiation Act provides, Sec. 403 (c) (2):

"All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

> tion account for payment to plaintiffs and intervenors,' leaves the courts without power to interfere."

Doubt alone concerning respondent's right to recover its funds, once they are covered into the Treasury, is sufficient to sustain the jurisdiction of an equity court. The remedy elsewhere to defeat jurisdiction here, must be equally "certain and in other ways efficient".[40]

But more important, whether the respondent would be relegated to the Court of Claims or to the Admiralty Court in suits on its contracts to recover monies withheld, it would be subjected to the additional hazard of complete loss of all its rights. This is because there can be no recovery against the United States for tortious acts of its officers. Thus, the Supreme Court has said:[41]

> "The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized. Acts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen."[42]

The Court said in the *North American Transportation and Trading Company* case that what an officer of the government had done without authority was tortious and created no liability on the part of the government.

Therefore, if the petitioners in this case, acting without authority of law, withhold or cause to be withheld from respondent monies due it on contracts with the United States and consign the same to the Treasury, respondent may be completely barred from its recovery.

So long as petitioners have not actually seized respondent's property, an equity court—and only an equity court

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[40] *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203.

[41] *United States* v. *Goltra*, 312 U. S. 203, 208.

[42] *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330; *Phelps* v. *United States*, 274 U. S. 341; *Hooe* v. *United States*, 218 U. S. 322.

can stay petitioners' hands. It can prevent the threatened unlawful action.

The respondent should not be sent elsewhere, because when once the mischief is done, there may be no remedy at all.

X.

In no Event Could Respondent in any Forum Recover Interest on the Money so Seized.

In the event petitioners should withhold moneys due respondent, it would lose not only the use of its money, but the interest thereon during at least a portion of time necessary to recover it. It could not in any forum, if the money be wrongfully withheld, recover interest during the whole time necessary to its recovery.[43]

The Act of March 3, 1911, c. 231 (36 Stat. 1141) as amended, 28 U. S. C. 284, expressly says:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *."

The Suits in Admiralty Act, c. 315 (47 Stat. 420), 46 U. S. C. Sec. 745 provides that

> "no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized hereunder."

The fact alone that in no action could respondent ever recover interest on the amount withheld from it, is ground for jurisdiction in equity. This is demonstrated by *Hopkins* v. *Southern California Telephone Co.*, *supra*. Suit was brought by the telephone company to enjoin the county from seizing and selling certain telephone sets in satisfac-

[43] *United States* v. *Goltra*, *supra*; *United States* v. *U. S. Fidelity & Guaranty Co.* (10 C. C. A., 1939), 106 F. (2d) 804, reversed on other grounds 309 U. S. 506; *Henkels* v. *Sutherland*, 271 U. S. 298.

tion of a tax which the company claimed was in conflict with the Federal Constitution. The Court pointed out:

> "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments."

The significance of plaintiff's inability to recover interest in any such actions as defendants suggest (as bearing on the inadequacy of such other remedies) is apparent also from *California* v. *Latimer*, 305 U. S. 255. The amount involved was $7,862.32. There the Court was able to find that payment would not cause irreparable injury because:

> "the amount paid with interest could be recovered if not due."

Here, that item never would be recoverable.

CONCLUSION.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the petition for a writ of certiorari should be denied.

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Dated October 13, 1945.

Allen J. Krouse,
Of Counsel.

APPENDIX A.

The Shipping Act, 1916, as Amended.

Title 46 U. S. C.

"Sec. 808. *Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade.*

* * * * * * * *

"Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States."

* * * * * * * *

APPENDIX B.

The Declaratory Judgment Act.

Title 28, U. S. C.

"Sec. 400. Declaratory judgments authorized; procedure

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 435.

EMORY S. LAND, individually and as Chairman of the United States Maritime Commission, et al., *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

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IN THE

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v.

WATERMAN STEAMSHIP CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. Whether agreements for the charter of vessels, entered into by the respondent steamship company with the British Ministry of War Transport, an agency of the British Government, are contracts with a "Department" within the meaning of Section 403 of the Renegotiation Act of 1942, as amended.

2. Whether the courts may enjoin petitioners, who, disregarding the provisions of such charters, have determined them to be contracts with the Maritime Commission, from further applying the provisions of the Renegotiation Act

to such agreements, and enter judgment declaring the rights of the parties to the controversy.

3. Whether the petitioners, acting without authority of law, may be enjoined to prevent a tort consisting of a trespass against respondent's rights and property, where respondent has no remedy at law.

4. Whether the existence of an administrative remedy for the determination of excessive profits realized under contracts with specified departments of the Government, deprives courts of equity of jurisdiction to enjoin the application of the provisions of the Renegotiation Act to respondent's contracts with a foreign government.

5. Whether the courts have jurisdiction to enter a declaratory judgment of the rights of the parties in a case of actual controversy involving no case of administrative discretion, and where no adequate or exclusive administrative remedy is provided by statute.

STATUTES INVOLVED.

The Renegotiation Act of 1942, and each amendment thereto, is set out in full in Appendix C, filed by petitioners. Reference to this document will be designated "Pamphlet" throughout this brief.

The relevant section of the Shipping Act, 1916, and the Declaratory Judgment Act are set forth in Appendix 2 and Appendix 3, respectively, pages 71 and 72, of this brief.

Because of the confused arrangement of the Renegotiation Act and amendments thereto appearing in the Pamphlet, there is presented here for the convenience of the Court, an outline of the material provisions of such Act. This statute originally enacted April 28, 1942, has several times been amended. The last amendment, so far as pertinent here, was by the Revenue Act of 1943, (58 Stat. 78) which was enacted subsequent to the purported commencement of renegotiation of the charter agreements between

the respondent and the British Ministry of War Transport. (Pamphlet p. 18)

1. The Renegotiation Act was made applicable *only* to contracts with certain Departments of the United States Government, defined as follows: (Pamphlet, p. 15)

> "The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively."

The War Shipping Administration was added by the Revenue Act of 1943, supra. (Pamphlet, pp. 18, 19). Previously on February 12, 1943, General Order No. 30 of the War Shipping Administration was issued establishing the War Shipping Administration Price Adjustment Board for the renegotiation of war contracts with the War Shipping Administration. (8 F. R. 2043)

2. With respect to the Maritime Commission, the term "Secretary" is defined to mean the Chairman of such Commission. (Pamphlet p. 15) The terms "renegotiate" and "renegotiation" are defined to include "the re-fixing by the Secretary of the Department of the contract price." (Pamphlet p. 6).

3. The Act authorized the Secretary of each Department to delegate "in whole or in part" his "authority and discretion herein conferred" to such individuals and agencies in such Department as he may designate. (Pamphlet p. 5).

4. Petitioners commenced renegotiation of the charter parties between respondent and the British Ministry of War Transport and made the determinations hereinafter referred to, purportedly under Sec. 403 (c) (1) and (2) of the Renegotiation Act, which provide that: (Pamphlet, pp. 8 and 9)

"(e) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * * All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

5. The statute was expressly made applicable—(Pamphlet p. 17)

"to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain

a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942: * * * " (Sec. 403(c)(6).

6. The Renegotiation Act prohibits the commencement of renegotiation of the contract price of any contract subject to such Act—(Pamphlet p. 12)

"more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs." (Sec. 403 (c)(6).

7. It is specifically provided by Sec. 403(c)(i) (Pamphlet p. 13) that the provisions of Sec. 403 shall not apply to:

"(i)any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States * * * or with any foreign government or any agency thereof;"

8. The petitioners have demanded of respondent that it furnish certain information, data and financial statements with respect to "the operation under Maritime Commission (British Ministry of War Transport) charter parties" of the vessels named in the complaint (R. 22) and specific voyage data "as to each vessel in the Red Sea operation" (R. 33), purportedly under the authority of Sec. 403(e) of the Renegotiation Act which reads as follows: (Pamphlet p. 4)

"(e) In addition to the powers conferred by existing law, the Secretary of each Department *shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable* in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly

furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. * * *" (Italics ours)

9. The only portion of the Act of February 25, 1944, which it will be necessary to consider in this case, is that which undertakes to provide for redetermination by the Tax Court of a determination by the Secretary as to the existence of excessive profits. These provisions are Sec. 403(e)(1), and Section 403(e)(2). (Pamphlet pp. 37-38.)

"(e)(1) * * * Upon such filing such court shall have *exclusive jurisdiction*, by order, *to finally determine the amount, if any, of such excessive profits* received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency.* The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court *to finally determine the amount, if any, of excessive profits* shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or

the deposition is taken. *The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).*

"(e)(2) Any contractor * * * aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, *as to the existence of excessive profits,* which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, *as to the existence of excessive profits,* which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. *Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1),* * * *" (Italics ours.)

STATEMENT OF THE CASE.

The Renegotiation Act of 1942 authorizes and directs the Chairman of the United States Maritime Commission (hereafter referred to as the Chairman) to renegotiate contracts entered into with the United States Maritime Commission (hereafter referred to as the Commission) when, in his opinion, the profits realized, or likely to be realized thereunder, may be excessive.

This suit is to prevent the petitioners, acting as individuals and not as officers of the Government, from committing a further trespass against the rights and property

of the respondent, by continuing renegotiation proceedings commenced by them, and further applying the provisions of the Renegotiation Act to charter agreements entered into between the respondent and the British Ministry of War Transport, an agency of the British Government (hereafter referred to as the British Ministry).

Respondent is engaged in the business of owning and operating American-flag steamships in the general trades, its vessels being operated without financial aid from the Government in any form. (R. 3)

On April 25, 1941, and several dates subsequent thereto, the respondent entered into charter parties with the British Ministry for the charter to it of certain vessels owned by respondent for the transportation "of lawful merchandise" (R. 13), in accordance with the terms and conditions set forth in the charter parties attached to the complaint. (R. 13)

The final payment of the agreed charter hire on each vessel was made to respondent on the respective dates specified in the complaint, the latest of which was November 28, 1941, approximately five months prior to the enactment of the Renegotiation Act (R. 5). Such payment was made by the Commission pursuant to an arrangement entered into between an agency of the United States and an agency of the British Government, to which respondent was not a party, and about which it was not consulted (R. 4, 30). Under said arrangement it was agreed that the Commission "will make the following payments *required to be made to the owners*, or chartered owners, *by the British Ministry of War Transport* under the terms of the charter." (R. 20) (Italics ours). Respondent completed its obligations to the British Ministry under the terms of each of the charters, and said charters were terminated on the respective dates specified in the complaint, the latest of which was January 26, 1942, more than one whole fiscal year prior to the purported commencement of renegotiation of said charters by the Board. (R. 5) The fiscal year of the

respondent in 1942 and for many years prior thereto ended on September 30. (R. 3)

Administrative Order No. 64 of the Commission, established the Price Adjustment Board of the Maritime Commission, (hereinafter referred to as the Board). There was delegated to the Board by the Chairman the—

> "responsibility for bringing about such review of contract * * * prices as it may deem to be desirable, *renegotiating, or causing to be renegotiated*, such contract prices when, in its judgment, such action is necessary or desirable, and making such recommendations to the Commission as may be appropriate to effectuate the results of such renegotiations." (R. 11)

Furthermore, the Board

> "* * * in cases where it appears that costs or profits of contractors * * * are, or may be excessive for any reason, shall *initiate and be responsible for suitable action with a view to securing* adjustments and *refunds.*" (R. 12) (Italics ours)

On November 26, 1943, petitioners, purporting to act pursuant to the provisions of the Renegotiation Act and the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, promulgating the Purposes, Principles and Policies and Interpretations of such agencies under said Act (R. 24) served upon the respondent by registered mail "Notice of Initial Conference Under the Renegotiation Act Which Shall Constitute Commencement of Renegotiation." (R. 21) The respondent was directed to appear before the Board on December 13, 1943 for an initial conference and to furnish said Board with certain statements, information and financial data with particular reference to "the operation under Maritime Commission (British Ministry of War Transport) charter parties" of the vessels named in the complaint, (R. 22) said data to be used in determining *whether* respondent had realized excessive profits from its charter agreements with the British Ministry. (R. 23)

Such notice also informed respondent that—

> "You are at liberty at the initial conference * * * to state reasons why you are not subject to renegotiation." (R. 23)

On December 13, 1943, respondent, by letter of its Assistant Vice President, delivered on that date, denied the authority of the petitioners to require the renegotiation of, or their authority to renegotiate its charter parties with the British Ministry, and denied that such charter parties were contracts with a "Department" as defined in the Renegotiation Act. (R. 5, 29) In addition, respondent asserted that final payment of the charter hire had been made prior to the enactment of the Renegotiation Act; that the charters were completed in a fiscal year ending more than one year prior to the purported commencement of renegotiation, and that the payments to the respondent for the account of the British Ministry of War Transport were made pursuant to an arrangement strictly between the Commission and the British Ministry to which respondent was not a party and concerning which it was not consulted. (R. 4, 29)

Thereafter on May 23, 1944, petitioners notified respondent that: (R. 6, 31)

> "After considerable study of the entire Red Sea operation, I am satisfied that there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable."

It was further stated in said notice of the Board that it—

> "would not ask the vessel owners to go to the trouble of furnishing any financial data until I was satisfied that there was a renegotiable agreement with the Commission."

The rejection of respondent's claim that its charters with the British Ministry were not subject to the Renegotiation Act, and the determination that such charters were in fact contracts with the Commission, assertedly is based upon the fact that the vessels were made available under charter parties signed by the British Ministry and that the arrangement between the United States Government and the British Government, whereby the Commission was to pay the charter hire required to be paid by the British Ministry, was evidenced by correspondence with the vessel owner. (R. 32)[1]

The notice further stated (R. 32):

> "In view of the foregoing I suggest a conference at this office, 1200 15th Street, Washington, D. C. * * * at 10:00 A. M. on June 29 with Waterman Steamship Company *for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act.*" (Italics ours.)

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[1] Obvious reference is to two letters addressed to respondent under the dates of May 31 and June 7, 1941, respectively. In the first letter it is stated:

> "The payment of the amounts due under the charter will be made as promptly as possible by the U. S. Maritime Commission from Lease-Lend funds. We are now endeavoring to perfect our procedure under the Lease-Lend Act, so as to insure prompt payment."

In the letter of June 7, 1941, the Commission advised the respondent that "practically all the details have been settled" and that "In securing reimbursement for the charter hire on these vessels we wish you to observe the following instructions:

> "1. Freight Bill. Upon vessel's sailing prepare a bill for freight earned by the vessel segregated to show the cubic capacity of the vessel under-deck, pursuant to the amount and at the rates shown in the charter and the cubic space occupied by on-deck cargo at the charter rate. *This bill should be certified by an authorized representative of the British Ministry of War Transport in New York.*" (Italics ours.)

There followed certain other instructions regarding the submission of copies of the executed charter, certificate approved by the agent of the charterer with respect to on-deck cargo, and preparation and submission of public voucher.

The notice demanded that respondent submit statements, information and financial data in accordance with a proposed outline attached thereto. This consisted of a document entitled "Statement in Renegotiation" in the *form of an affidavit* in which the officer of respondent executing the same *would make oath*, among other things as follows:

> "(1) that I am an officer to wit..... of....., *the Contractor* signing Exhibits A and B hereto attached;
>
> "(2) that I am duly authorized to execute this statement on behalf of *said Contractor;*"
>
> • • • • •
>
> "(4) that I have reviewed and verified the general information, financial data and specific voyage data as to each vessel in the Red Sea operation hereto attached as Exhibit A." (Italics ours.) (R. 33)

Exhibits A and B referred to therein consist of certain general information and financial data regarding the respondent corporation, and voyage data in detail with respect to each of the vessels chartered by respondent to the British Ministry under the so-called Red Sea Charters. (R. 34)

On June 27, 1944, respondent filed its complaint herein (R. 1 et seq.) alleging the foregoing facts, and seeking (1) an injunction against further trespass upon respondent's rights and property and threatened irreparable injury which would result from carrying out the unlawful determinations and demands theretofore made by petitioners, and (2) a declaratory judgment that the charters in controversy are not subject to the provisions of the Renegotiation Act.

On June 28, 1944, respondent filed its motion for a preliminary injunction (R. 35). On July 10, 1944, petitioners filed their Motion to Dismiss (R. 37) upon the grounds that (a) the Court lacks jurisdiction over the subject matter of the action, and (b) that petitioner had failed to show any

injury, irreparable or otherwise, and had failed to exhaust its administrative remedies.

The District Court denied respondent's motion for preliminary injunction and dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (R. 38). On appeal, the Court below reversed and remanded the case to the District Court for consideration of the single question "Were the charter agreements, entered into in 1941 by Waterman Steamship Corporation and the British Ministry of War Transport, contracts with a 'Department' within the meaning of Section 403 of the Renegotiation Act of 1942?" (R. 52)

Certiorari was granted November 5, 1945. (R. 56)

SUMMARY OF ARGUMENT.

I.

The charter parties between respondent and the British Ministry are not contracts with the Maritime Commission. The Congress, although requested to do so, refused to amend the Renegotiation Act to subject contracts with foreign countries to its provisions. Therefore, the Renegotiation Act confers upon petitioners no authority to renegotiate contracts with a foreign government. The charter hire required to be paid by the British Ministry under the charters, was paid by the Commission pursuant to an arrangement between the United States Government and the British Government, which arrangement is not subject to the provisions of the Renegotiation Act. The determinations of petitioners that the charter parties in controversy are contracts with the Commission, and that excessive profits have been realized, and their demand for the submission of statements, information, and financial data, for the purpose of determining the amount of alleged excessive profits, are an invasion of respondent's legal rights, and unless the relief sought is granted, will result in depriving respondent of its property without due process of law.

II.

The existence of an administrative remedy for the determination of the amount, if any, of excessive profits realized under contracts with a "Department," as defined in the Renegotiation Act, (the purpose for which it was established by the Congress) does not deprive a court of equity of jurisdiction to enjoin the unlawful application of the provisions of such Act to respondent's charter parties with a foreign government, where claim to exemption from the provisions of the Act has been definitely rejected by petitioners and a determination made by them that such charters are agreements with the Commission, and are subject to the provisions of the Act. *Trust Company* v. *Schnader,* 291 U. S. 24; *Stark, et al.* v. *Wickard,* 321 U. S. 288. The fact that the administrative body *may,* upon consideration, determine that no excessive profits were realized, is immaterial. Respondent is entitled to come into Court in this case, not to review action within the discretionary authority of the petitioners to render a favorable, rather than an adverse decision, but because of erroneous determinations of law completely outside petitioner's authority. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 134.

III.

The Renegotiation Act does not authorize the renegotiation of contracts with foreign governments, and no administrative remedy is provided to meet the grievances alleged in the complaint, and none is otherwise available. The Act does not contemplate unlawful conduct beyond its terms and entirely outside the scope of its authority. The procedure prescribed in the Renegotiation Act could not possibly be used to challenge the authority of petitioners to make the determinations and demands which they have made. Moreover, respondent is not required to pursue such administrative remedy, because the statute upon its face shows that it is incapable of affording judicial protec-

tion against the arbitrary, or illegal acts of petitioners in asserting jurisdiction to renegotiate respondent's contracts with the British Ministry, and their statutory authority to make the determinations already made. *Yakus* v. *United States*, 321 U. S. 414. If the administrative procedure provided in the Renegotiation Act were availed of by respondent, its use would admit the illegality of the protested determinations and other acts of petitioners, and leave respondent at the mercy of petitioners in carrying out their unlawful purpose. *Lukens Steel Company* v. *Perkins*, 70 App. D. C. 354, (reversed on other grounds—310 U. S. 113); *In Re Fassett*, 142 U. S. 479.

IV.

Respondent is entitled to the relief sought because it has no remedy at law which is plain, adequate, certain, effective and complete under the Tax Court procedure, or otherwise. In the most favorable aspect of petitioners' contentions, whether respondent could ever obtain relief at law, even against some party other than petitioners, is a matter of sheer speculation. If the petitioners, pursuing the course already plotted by them, withhold monies due respondent on its contracts with the United States, the statute immediately places it beyond the reach of respondent. (Pamphlet, p. 9). Thus, respondent's property having been taken without authorization of Congress, there is no plain and certain right of its recovery. *United States* v. *Goltra*, 312 U. S. 203.

It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will afford relief. Where equity can give relief, respondent is not to be compelled to speculate upon the chance of obtaining relief at law. *Davis* v. *Wakelee*, 156 U. S. 680.

V.

A declaratory judgment is an appropriate remedy where it will clarify and settle legal relations in issue and where it will terminate and afford relief from uncertainty and

controversy. It is a remedy which may be granted without regard to the existence of a remedy elsewhere, and even in the absence of an allegation that "irreparable injury is threatened." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227.

Respondent's legal and constitutional rights have been and are affected and brought into question by the conduct and threatened conduct of petitioners. The question of legality of the action of petitioners in determining to apply, and in applying the Renegotiation Act to the charter agreements entered into between the respondent and the British Government has arisen between the parties hereto; namely, whether the Renegotiation Act confers upon petitioners authority to apply its provisions to said charter parties and to make the determinations heretofore made and to take further threatened action thereunder. This question is fundamental to all activity of the petitioners, with respect to the renegotiation of such charter agreements.

Where the petitioners have denied claim for an exemption from the terms of the Renegotiation Act, of contracts between respondent and the British Ministry, in complete disregard of their provisions as is the case here, (*United States* v. *Atchison T. & S. F. Railway Company*, 234 U. S. 476), and since petitioners' determination that respondent's charter parties are contracts with the Commission subjects respondent to a statutory command, compelling it to comply with the demands of petitioners, there is a constitutional case or controversy. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Rochester Telephone Corp.* v. *United States*, *supra*.

VI.

Respondent is entitled to the relief sought on the ground that it would be subjected to a multiplicity of actions, either as plaintiff or defendant, even if a legal remedy were available to it. Furthermore, respondent would not only lose the use of money to which it is legally entitled, but if re-

covery could be had at all, it would lose interest thereon during at least a portion of the time necessary for recovery.

VII

While petitioners have not heretofore raised the issue that this is an action against the United States, the principle decided in *Mine Safety Appliances Company* v. *Forrestal,* (No. 71, this term) decided December 10. 1945, has no application here. To prevent petitioners from doing what they have no legal right to do, is not an interference with the performance of a function of government entrusted to them by statute. *Ex Parte Young,* 209 U. S. 123; *Stark, et al.* v. *Wickard, supra.*

ARGUMENT.

I.

The Agreements Between Respondent and the British Ministry, upon which Petitioners have Commenced Renegotiation Proceedings are not Contracts with a "Department" within the Meaning of the Renegotiation Act of 1942, as Amended, but are Contracts with a Foreign Government.

This case turns on the question of whether the Congress has subjected to the provisions of the Renegotiation Act, charter parties entered into between respondent and the British Ministry upon which petitioners purportedly have commenced renegotiation proceedings. Respondent maintains (1) that the power of petitioners is circumscribed by the authority prescribed in the Renegotiation Act; that because the Congress has passed no law with respect to the renegotiation of contracts with a foreign government, the petitioners were and are acting outside their authorized administrative power in dealing with government contracts; and (2) a court of equity is the only forum where respondent can secure protection against the arbitrary acts and determinations of petitioners entirely beyond the scope of

their delegated powers, which interfere with the legal rights of respondent, and threaten to deprive it of its property without due process of law. Petitioners contend that the existence of an administrative remedy with respect to contracts within the scope of the Renegotiation Act deprives a court of equity of jurisdiction to prevent the enforcement of determinations and demands already made and the further application of the provisions of the Renegotiation Act to respondent's charter parties with the British Ministry.

Whether the Congress has subjected the charter parties in controversy to the provisions of the Renegotiation Act is a question of law and can be decided only by the courts.[2]

For the purpose of determining this question, the allegations of the complaint must be accepted as true.[3] The case was submitted on a verified complaint and motion to dismiss.

(a) The Provisions of the Charters Show They Are Not Contracts With the Commission.

This Court has said that in any case[4]

> "of a written contract, those who are parties to and bound by it are to be ascertained *by an inspection of the document, and its provisions are controlling* in the absence of some positive rule of law or provision of statute requiring them to be disregarded." (Italics ours.)

The charter parties have been set out in the complaint. (R. 13) They were for the hire of the vessels of respondent only for outward voyages to the Red Sea area. Each such agreement provides that, (R. 13):

> "It is this day mutually agreed between *Waterman Steamship Corporation* Owners of the Steamship.....

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[2] *Newport News Shipbuilding and Drydock Company* v. *Schauffler*, 303 U. S. 54, 57.

[3] *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 414.

[4] *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

.....of..... tons net register, classed First Class American Bureau of Shipping now trading and *British Ministry of War Transport* Charterers, as follows:" (Italics ours).

The charters were signed in the names of the respondent, by its proper officials, and by the representative in the United States of the British Ministry. That this constituted a contract between respondent and the British Government, is conceded by petitioners by the motion to dismiss and in their brief. They assert no rule of law or provision of statute which entitles them or the Court to disregard the clear provisions of the charter agreements in determining the parties thereto. To place the charter parties outside the principle enunciated in the *Algoma case, supra,* petitioners rely solely upon argument, that "the Board's counsel" who "could not speak for the Board" and who "plainly expressed his opinion only, not that of the Board or the Chairman" (Petitioners' brief, p. 17) that "there was in each case (pertaining to the Red Sea operation) a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable." (Petitioners' brief, p. 8)

It is this determination by petitioners, set out in the notice to respondent, dated May 23, 1944, about which complaint is made. (R. 6) That determination is not supported by any facts, or even by any claim of the existence of any facts. Its sole support is found in the statement in such notice that the Commission had, by correspondence, evidenced to the vessel owner the arrangement between the United States and the British Government, by which it was agreed that the payments of charter hire "required to be made to the owners or chartered owners by the British Ministry of War Transport under the terms of the charter:", (R. 20) would be made by the Maritime Commission. (See footnote 1, page 11.)

No claim has been made by petitioners, either in the record or in their briefs that as between the Commission

and the respondent, the Commission at any time succeeded to any of the benefits running exclusively to the British Ministry.[5] It is merely asserted that the respondent was notified by the Commission, that pursuant to an arrangement betwen the governments of the United States and Great Britain, it, the Commission, would pay the charter hire "required to be paid by the British Ministry."[6]

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[5] Conclusive evidence that the Commission at no time thought that any arrangement with respondent in connection with the Red Sea charters could be regarded as a contract with a Department, is to be found in the absence of certain provisions which all United States government contracts are required by law or Executive Order to contain.

The Act of April 21, 1808, c. 48, Sec. 3 (2 Stat. 484), as amended, U.S.C. Title 41, Sec. 22, provides that there shall be inserted in every contract entered into on behalf of the United States an express provision that no member of or delegate to Congress shall be admitted to any share or part of such contract or to any benefit to arise thereupon.

Executive Order No. 8802, dated June 25, 1941 (6 F. R. 3109) provides in part that all contracting agencies shall "include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color or national origin."

[6] Reference is made in footnote 3, page 4, of petitioners' brief to the hearings conducted by a subcommittee of the Committee on Merchant Marine and Fisheries, House of Representatives, into the so-called Red Sea charters, and the report of said Committee. Petitioners' summary of the report fails to include pertinent facts outlined by the subcommittee (House Report No. 2088, 78th Cong., 2d Sess.) The report states: (p. 3)

> "The representatives of the Commission * * * proposed a rate of 75 cents net per cubic foot on the under-deck bale cargo capacity and 60 cents net per cubic foot for such cargo as was carried on deck. * * * All income from the carriage of commercial cargo on the outward voyages to the Red Sea was to be *for the account of the charterer,* * * *. Apparently *these rates and terms were fixed by the representatives of the Commission rather than by negotiation or bargaining.* * * * ". (Italics ours)

And further (p. 6):

> "As previously stated, the going commercial rates to the Red Sea at that time approximated $1 per cubic foot of cargo

All that was done by officials of the Commission in this case "in supervising the execution of the contracts and their performance, was consistent with the exercise of its function" in approving charters of American-flag vessels to aliens, under Section 9 of the Shipping Act, 1916 "without the assumption by the United States of any obligation to the" owners of the vessels "and no implied obligation on its part arises from the performance of that function." *United States* v. *Algoma Lumber Co., supra,* p. 422.

As was well stated by the Court below (R. 47)

> "Giving effect to all that is contained in this correspondence between a bureau of the United States and the British Shipping Mission, it shows no more than an understanding between the two governments that the United States would defray the expenses of the delivery from this country to ports on the Red Sea of war supplies to the British."

This understanding between the two governments which, so far as respondent is concerned, was "evidenced by cor-

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space (172), and this was the approximate figure paid on the 6,000,000 cubic feet of commercial cargo which was carried in the course of these voyages (202)."

Thus, the rate of charter hire fixed by the Commission was 25 percent lower than existing commercial cargo rates for the transportation of commercial cargo to Red Sea ports. The rate charged by the British Ministry for the transportation of the 6,000,000 cubic feet of commercial cargo which the Charter parties authorized, was 33⅓ percent in excess of what it was obligated under the charters to pay the American owners of the chartered vessels.

The Report continues: (p. 3)

> "The position of the Maritime Commission in obtaining these vessels was somewhat anomalous in that it was not to be one of the parties to the charters, was *not* to pay the costs of the voyages from its own funds, and yet was to establish and approve the rates as well as the provisions of the charters (10). The charters were to be made between the owners and operators of the vessels and the British Ministry of War Transport while payment of the charter hire was to be from lend-lease funds allocated for this purpose (10)." (Italics ours)

respondence between the Commission and the vessel owner" could have no possible effect

> "upon Waterman's legal rights in the charters, and this is especially true in the light of the allegation of the complaint that as to the arrangement Waterman was not consulted and took no part in its consummation." (R. 47)

(b) The Congress Refused to Amend the Renegotiation Act to Cover Contracts with Foreign Countries.

In enacting the Renegotiation Act, or amending it, the Congress might have provided any number of tests of whether a given contract would be subject to renegotiation, and delegated to the Secretary of each Department the authority to apply such tests and make a determination as to what contracts are to be renegotiated. But the Congress did not do so. It made its own determination as to the contracts to which the provisions of the Renegotiation Act should be applied. In the original Renegotiation Act, and through four successive amendments thereof, the Congress determined that *only* the contracts *with a Department*, as that term is defined in the Act, shall be subject to the provisions of such Act. It must be presumed that the Congress was cognizant of the rule of law previously announced by this Court that the express provisions of contracts are controlling as to who are parties thereto. *Cary* v. *Curtis*, 44 U. S. 236. The failure of Congress to enact any statutory modification of this firmly established principle, although requested to do so, must be taken as conclusive that none was intended. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619; *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375.

Before the renegotiation proceedings had been initiated by the petitioners with reference to the British Government contracts involved in this case, it was recommended by the Committee on Naval Affairs of the House of Representatives that contracts of American firms with the Allied governments, the financial obligations under which had been

assumed by the United States, pursuant to arrangements between such governments and the United States, acting in accordance with the Lend-Lease program, should be subjected to renegotiation.[7]

To carry out this recommendation, the Chairman of such Committee introduced a bill in the House of Representatives, September 22, 1943, which was referred to the Committee on Ways and Means.[8]

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[7] House Report No. 733, 78th Congress, 1st Session, states: (Pp. 24, 25, 26)

> "Renegotiation, it will be recalled, is not applicable to all Government procurement. Only those contracts may be renegotiated which have been awarded by the War, Navy, and Treasury Departments, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Defense Supplies Corporation, Rubber Reserve Company, and Metals Reserve Company. • • •
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> • • • • • • • • •
>
> "There are still vast areas of procurement, however, which lie outside renegotiation. • • •
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> • • • • • • • • •
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> "During the course of the investigations made by the Committee, our attention was also directed to a group of lend-lease contracts which appear to lie at the present time outside of the scope of renegotiation. *Prior to our entry into the war, the British and other Allied Governments in 1940 and 1941 placed large orders with many American firms for war materiel.* These contracts were subject to the same uncertainties of cost that have characterized the war contracts entered into by the War and Navy Departments. • • • *We think that the law should be amended so as to subject this group of contracts to renegotiation.*" (Italics ours.)

[8] H. R. 3316, 78th Congress, 1st Session. Section 11 provided for the amendment of Section 403 (k) of the Renegotiation Act to read in pertinent part, as follows:

> "(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, Rubber Reserve Company, the Department of Agriculture, the War Shipping Administration, and to contracts with any foreign government, or any agency thereof, described in section 403 (i) (1) (i) hereof. • • • "

Although the Ways and Means Committee subsequent to the Report referred to above, recommended a great number of amendments to the Renegotiation Act, which (with modification) were enacted by the Congress on February 24, 1944, the recommendations of the Naval Affairs Committee were not enacted into law. The statute, as so amended, retained in effect the basic requirement that a contract be one *with a department* before the Renegotiation Act could lawfully be applied to it. By failing to extend the Renegotiation Act to British Government contracts financed by the United States through advancements under the Lend-Lease program, although it was requested so to do, Congress clearly indicated its intention that the Act should not apply to such contracts.

The fact that the Renegotiation Act has a restricted and limited field of applicability has recently been recognized by this Court in *Muschany et al.* v. *United States*, 324 U. S. 49.

In that case, the government sought to repudiate option contracts which had been entered into by the War Department for the purchase of land to be used as the site for an ordnance plant. Among the grounds urged by the government for such repudiation was the fact that the contracts resulted in a very high profit to the owners of the land.[9]

The amendment of Section 403 (i) (1) (i) (Section 10 of the Bill) provided for renegotiation of contracts with any foreign government or agency thereof where any department or any other agency of the United States acquires the interest of any foreign government in a contract entered into by such foreign government with a contractor doing business in the United States. Such provisions would not even include the Red Sea Charters. No department or agency of the United States ever acquired the interest of the British Government in such charters.

[9] The contract in one case provided for the payment by the government of $4,500 for certain land which had been acquired by the owners in 1939 for $1,000. In the other case, the government agreed in 1940 to pay $12,000 for land which petitioners had acquired in 1934 for $2,250.

The Court sustained the validity of both contracts, and with respect to whether the Renegotiation Act established an all-pervading policy against high profits, or only a curb upon such profits under specific contracts, the court said (p. 58):

> "* * * Congress' adoption of statutes providing for the renegotiation of war contracts indicates that *in certain instances* the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so *cannot be disregarded* by this Court." (Italics ours.)

In the case at bar, the contracts were entered into with a foreign government, and the Congress, having been advised by one of its Committees that they were not subject to the provisions of the Renegotiation Act, refused to make them so. This fact would seem to require the same conclusion reached by the court in the *Muschany* case, *supra*, that (See footnote 8, page 59)

> "Legislation in regard to the renegotiation of war contracts is not applicable to either of the contracts involved in this case."

(c) The Petitioners Have Purportedly Commenced Renegotiation of Respondent's Charters With the British Government and Have Made Determinations With Respect Thereto.

Counsel for petitioners undertake to argue that on the basis of the record there exists nothing more than a disagreement between counsel for respondent and counsel for the Board "as to whether certain contracts are subject to the Renegotiation Act." This is an inaccurate statement of the record, and the argument, based upon such error, must be disregarded. The allegations of the complaint, which must be taken as admitted, show that under date of November 26, 1943, by registered mail, there was sent respondent a "Notice of initial conference under the Renegotiation Act

which shall constitute commencement of renegotiation," and fixing a time on December 13, 1943 for an initial conference with the Board.[10]

The Board, in said notice, demanded of the respondent that it submit certain information regarding terminated voyage revenue and expense and other income and expense "showing separately the operation under Maritime Commission (British Ministry of War Transport) charter parties" of respondent's vessels named in the complaint. Respondent was also asked to submit a "detailed breakdown of overhead in said period * * * showing separately that part which in your opinion should be allocated to the operation under Maritime Commission (British Ministry of War Transport) Charter Parties" covering the same vessels. A mass of other financial and related data was demanded of respondent for the calendar years 1941 and 1942 (R. 22, 23).

The respondent on December 13, 1943, the date set for the initial conference appeared, and filed a letter with the Board, signed by its Assistant Vice President, (R. 29) denying the authority of the Board or the Chairman to renegotiate the charter agreements for the reason that they were entered into with the British Government and were not contracts with the Commission. Respondent also asserted that the payments to it were made for the account of the

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[10] This was more than one full year after the close of the fiscal year of the respondent within which the charter parties were completed and terminated. The Chairman has determined with respect to contracts with the Commission that the term "completion of the contract" means—

> "final delivery or acceptance under the contract, rather than final payment, and the fact that a contractor may still have certain obligations under guarantees of performance or the fact that there may be unliquidated items outstanding does not extend the time of completion beyond the date of final delivery or acceptance." (R. 28)

If the charters in controversy had been contracts with the Commission, they would be exempted by this determination of the Chairman, made pursuant to Sec. 403 (e) (6). (Pamphlet, p. 12)

British Ministry, pursuant to an arrangement strictly between the Commission and the British Ministry, to which respondent was not a party and concerning which it was not consulted. (R. 29) Respondent refused to furnish the information and financial data demanded by the Board in such notice. By letter, dated May 23, 1944, on the letterhead of the Commission, signed "Kenneth F. Clark, Price Adjustment Board," respondent was advised that its claim that the charter parties are not subject to the provisions of the Renegotiation Act, had been definitely rejected and that a determination had been made that "there was in each case a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable." (R. 31) A time was fixed for a conference "for the purpose of determining *what portion of the profits* of these companies *is excessive within the meaning of the Act.*" (R. 32) (Italics ours.)

Again, a demand was made for the submission of information and financial data in accordance with the proposed outline enclosed with the letter. These forms call for the execution of a "Statement in Renegotiation," to which would be attached several exhibits containing general information and detailed data with respect to each vessel operated under the Red Sea charters. (R. 33, 34) Thus, the statement in petitioners' brief at page 17 that nothing in the letter altered the invitation in the original notice to state reasons why you are not subject to renegotiation, is clearly erroneous.

Respondent alleges in the complaint that, by letter dated May 23, 1944, "the defendants replied and advised the plaintiff that * * * it had been determined there was in each case a contract between the vessel owner, the plaintiff, and the Maritime Commission to which the Renegotiation Act is applicable," (R. 6). The letter is set out in full as Exhibit I to the compaint, (R. 31, 32). The truth of this allegation is admitted by the motion to dismiss. Counsel for petitioners may not by argument be heard to say that this letter

merely expressed the opinion of the Board's counsel, and not that of the Board or the Chairman. It is further asserted by petitioners that in any event, the Board's counsel could not speak for the Board, and the Board has not determined that these contracts are subject to the Act.

This merely begs the question. The respondent is not required under any rule of law to conduct an investigation for the purpose of determining the location of the boundary lines which mark the limits of the authority of the respective members of the Board and its staff.

The fact is that the letter constituted an official notification that respondent's charter agreements with the British Government had been determined to be contracts with the Commission and subject to the provisions of the Renegotiation Act, and that excessive profits had been realized therefrom. The notice fixed a time and place for a conference to be held, not for the personal enlightenment of an unauthorized member of the Board's staff, but for the serious purpose, as stated in the notice, "of determining what portion of the profits" is excessive within the meaning of the Act. (R. 32) Moreover, the notice came from a Board, to which had been delegated the authority and responsibility of "renegotiating, or causing to be renegotiated," contracts with the Maritime Commission and to "initiate and be responsible for suitable action with a view to securing adjustments and refunds." (R. 11, 12).

Petitioners' argument is contradicted by their own records with respect to demands upon other steamship companies which entered into charter parties with the British government under the same circumstances as those in controversy here. For illustration, on December 8, 1944, Mr. Clark, who was at that time a member of the Board, notified another company that:

> "* * *We may reach a point very soon where we will have to enter unilateral orders determining excessive profits * * *."

And again on December 16, 1944, Mr. Clark notified the company:

> "This Board, however, will not hesitate to issue a unilateral determination because renegotiation must be concluded either by agreement or by unilateral determination." [11]

It will be noted that Mr. Clark, speaking for the Board, did not say that "I will recommend to the Board which, in turn, will recommend to the Chairman" that certain determinations be made. He was emphatic in stating that the Board would enter unilateral orders or a unilateral determination.

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[11] There is pending in the District Court of the United States for the District of Columbia the case of Luckenbach Steamship Company, Inc. v. Land, et al., Civil Action No. 28540, an action similar in nature to the case at bar. Under date of December 8, 1944, the same Kenneth F. Clark, for the Price Adjustment Board wrote to counsel for Luckenbach as follows:

> "We will wait a reasonable time for those who have not submitted figures, but it looks as though we may reach a point very soon where we will have to enter unilateral orders determining excessive profits on the basis of such figures as we have. I should much prefer to feel that the owners had presented their case as they believe it should be considered, and they have all had ample opportunity so to do up to the present, but only a few have responded." (Luckenbach Complaint p. 54).

Again, on December 16, 1944, the same Kenneth F. Clark for the Price Adjustment Board wrote to counsel for Luckenbach, as follows:

> "Furthermore, in consideration of the Red Sea operation, this Board will not depart from the informality which has attended all of its inquiries thus far into the question of whether or not excessive profits have been realized in a particular case.
>
> * * * * * * * *
>
> "This Board, however, will not hesitate to issue a unilateral determination because renegotiation must be concluded either by agreement or by unilateral determination." (See Luckenbach Complaint p. 59)

(d) *The Nature of the Determination and Demand for Submission of Data is Such That Equity May Intervene.*

Section 403(e) of the Renegotiation Act (Pamphlet p. 4) authorizes the Secretary of each Department

> "to demand of any contractor who holds contracts *with respect to which the provisions of this section are applicable*" (Italics ours)

statements of costs and other financial data in such form and detail as he may require. Criminal penalties are imposed for wilful failure or refusal to comply with such demand or requirement. Counsel for petitioners argue that since the Board's letter of May 23, 1944, was couched in polite language, it merely constitutes a "request", as distinguished from a demand.

Petitioners have no right to demand the submission of statements, information and financial data for the purpose of determining excessive profits under contracts, except those with respect to which the Act applies.

Administrative determinations such as have been made by petitioners in this case, may, and do, if uncontested, determine, for all practical purposes, the respondent's rights or obligations under the Renegotiation Act with respect to its charters with the British Ministry, as effectively as the judgment of a court. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 408.

Therefore, where such determinations are beyond the scope of the statute, as is the case here, it is within the jurisdiction of a court of equity to enjoin the enforcement of such determinations and demands, and the further application of the provisions of the Act to contracts which clearly are not subject to its provisions.

Petitioners' suggestion that the determinations and demands complained of herein, had reference to contracts with a "Department", and not to these specific contracts, is not in accord with facts of which petitioners have knowledge.

On May 24, 1944, one day following the notice that respondent's charters were subject to the provisions of the Renegotiation Act, the War Shipping Administrator (who was also Chairman of the Commission) through the War Shipping Administration Price Adjustment Board notified respondent that "The matter of conducting your statutory renegotiation proceedings has been assigned to this office", and called attention to the fact that renegotiation for fiscal years ending on or before June 30, 1943 is controlled by the Renegotiation Act of 1942, as amended, and with respect to fiscal years ending subsequent to June 30, 1943, is controlled by the Renegotiation Act of 1943. (See Appendix 1, p. 69, *infra.*)

In view of this fact, and the conduct of petitioners toward other companies with respect to their Red Sea charters, (See footnote 12, p. 36, *infra*), it cannot be maintained that the notice with respect to the Red Sea charters had reference to any of respondent's contracts with a Department.

If the rejection and determination referred to above are correct, respondent may not lawfully refuse to furnish statements of actual cost and such other financial statements as the petitioners may require, and the reason it may not refuse is that the petitioners have, in effect, *ordered* the submission of such statements. It is obviously incorrect to state, as the District Court did in its decision, that no order of any sort has been issued to the respondent herein. The petitioners have demanded that the respondent furnish statements, information and financial data on the erroneous determination which has been made that the charters involved herein are contracts "with respect to which the provisions of this section (Renegotiation Act) are applicable." That is an "order." Refusal by the respondent to comply with it is punishable by a severe fine or imprisonment or both. Moreover, it is void *ab initio* and equity may relieve against it.

The Renegotiation Act of 1942 does not authorize the issuance of any "orders" *except* to the extent that it confers

upon the Secretaries the right "*to demand*" (to order) the submission of financial data and other statements. If the demand to furnish financial statements and other data under penalty of criminal punishment is not an order, then it is difficult to understand when an order ever would be said to have been made under the Renegotiation Act of 1942.

In *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177, the Court considered a case wherein the claim was made that an administrative "determination" was not an "order." That case presents a situation quite similar to that involved in the case at bar. The statute involved in that case (Railway Labor Act) imposed certain obligations on railroad carriers but expressly exempted interurban railway lines unless such railway lines be operated as a part of a general steam railroad system of transportation. The Act authorized and directed the Interstate Commerce Commission, upon request of the Mediation Board, to determine whether any line operated by electric power falls within the terms of the exception contained in the Railway Labor Act. (In the case here, the Act does not direct the Chairman to determine what contracts shall be renegotiated. The Congress made that determination when it enacted the law.) Such Railway Labor Act also imposed upon the Mediation Board the power and the duty to prescribe a form of notice which carriers subject to that Act were required to post under pain of criminal prosecution. (Here, if the charters are "contracts with respect to which the provisions of this Section are applicable" respondent is required to submit the information demanded, under pain of criminal prosecution). Acting under the statute, the Interstate Commerce Commission determined that the Utah Idaho Central Railroad Company was not within the exception contained in the Railway Labor Act, that is, that the railroad was subject to the Railway Labor Act. Thereupon, the Mediation Board requested the posting by the railroad of a form of notice. The Company refused to post such notice and brought suit to enjoin the United States Attorney from

prosecuting any proceeding based upon an alleged violation of the Railway Labor Act by the Company. One of the questions before the Court was whether the *determination* of the Interstate Commerce Commission, to the effect that the Utah Idaho Central Railroad was subject to the Railway Labor Act, could be regarded as an "order" which was binding upon the Mediation Board. In holding that the determination was an order the Court stated: (p. 182)

> "We have held that the determination of the Commission is not an '*order*' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan* v. *United States*, 303 U. S. 596, supra. But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the Shannahan case, we had no occasion there to consider. Id., at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. *It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act* which was enacted to regulate the activities of transportation companies engaged in interstate commerce. * * * Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions." (Italics ours)

The *Shields* case was referred to and its holding approved in *Utah Fuel Company* v. *National Bituminous Coal Commission*, 306 U. S. 56. In that case, plaintiff sought to enjoin the publication by the Coal Commission of certain data which it had furnished to the Commission as a Code Member under the Bituminous Coal Act. Plaintiff interpreted that Act as requiring that such information be kept secret while the defendant interpreted the Act as authorizing publication of such information and declared its in-

tention of publishing the same. Plaintiff filed a complaint in the District Court for the District of Columbia seeking an injunction against the threatened disclosure. The trial Court decided the case *on the merits* in favor of the Coal Commission holding that "the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act."

Appeal was taken to the Court of Appeals where, as in the present case, the defendant alleged that the Court lacked jurisdiction. The Court of Appeals refused to consider the case on the merits and approved the dismissal of the bill on the grounds that plaintiff had failed to exhaust its administrative remedies, for which reason, it was held, equity jurisdiction could not be invoked. (69 App. D. C. 333).

On certiorari, this Court rejected the contention that the plaintiff had no standing in equity. While holding that the Bituminous Coal Act authorized the publication of the information, the Court reached its decision after an analysis of the pertinent provisions of the Act, and with reference to the claim that a bill in equity would not lie stated: (p. 59)

> "A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho C. R. Co.*, (305 U. S. 177, Ante, 111, 59 S. Ct. 160), decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not 'interurban' did not constitute an 'order' reviewable under the Urgent Deficiencies Act of October, 1913, nevertheless, in the circumstances disclosed, it could be subjected to judicial review by bill in equity. • • •
>
> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, *and the lack of any other remedy*, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be 'determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not.'" (Citations omitted.) (Italics ours)

The situation in the case at bar is very similar to that in *Trust Company* v. *Schnader*, 291 U. S. 24, (see also 293 U. S. 112), where appellant sought to enjoin officials of the Commonwealth of Pennsylvania from attempting to impose and collect an inheritance tax. The appellee contended that the appellant had an adequate remedy at law as it could appeal from the appraisement when made, to the County Court which had jurisdiction to pass on both the amount of tax and the legality of its imposition, and that since this procedure had not been followed, the bill was prematurely filed. The Court in denying this contention stated: (p. 34)

> "* * * However, in view of the allegations of the bill, we are not inclined to hold the suit premature. The bill charges that the Secretary of Revenue has refused to issue a waiver of tax, and that the Attorney General has notified the appellant and the State's appraiser the property is subject to the tax, and the appellant's claim for exemption will be denied. The Commonwealth's law officers plainly intend to perform what they consider their duty, and will, unless restrained, cause the assessment and imposition of the tax. The action the legality of which is challenged thus appears sufficiently imminent and certain to justify the intervention of a court of equity."

The fundamental findings or determinations with respect to respondent's charters have already been made, and a demand has been issued requiring, under sanction of criminal penalties, the submission of financial statements and other data to enable the petitioners to determine the amount of alleged excessive profits. Petitioners plainly "intend to perform what they consider their duty and will unless restrained," further invade the legal rights of respondent by withholding sums due it from the United States, or causing the respondent to become plaintiff or defendant in a multiplicity of suits.

Actions taken by the Board subsequent to the filing of the complaint herein with respect to charter parties entered into by the British Ministry with other ship own-

ers, clearly show that the allegation in the complaint that petitioners "intend to and will" make "a unilateral determination of alleged excessive profits under the charter agreements" and "unlawfully withhold amounts due the (respondent) from the United States" are not mere predictions.[12] They are realities and it is obvious from their conduct that petitioners will, unless restrained, deprive respondent of a portion of the proceeds of its contracts with the British Ministry.

Reference is made by petitioners in their brief, at page 17 (Footnote 10) to a letter from the Board, outlining what is now claimed to be the Board's practice regarding unilateral determinations with respect to whether excessive profits "within the meaning of the Act may have been realized by the contractor from contracts with the United States * * * as defined in Section 403 of the Act." (Petitioners' brief, p. 67) This device, obviously was conceived by the Board between the dates of the Board's notices to *Luckenbach Steamship Company, Inc.*, on December 8 and 16, 1944 (see footnote 11, page 29) and the date of the Board's notice to the Isthmian Steamship Company, under date of June 15, 1945. (See footnote 12.) The state-

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[12] Isthmian Steamship Company v. Land, et al., Civil Action No. 29546, referred to in the brief in support of Petition for Certiorari, is a case similar in nature to the one at bar, and involving charters with the British Ministry entered into in the same form and under similar circumstances as those in issue here. On June 15, 1945, the Board notified the Isthmian Steamship Company that it "has approved the attached recommendation as to the amount of excessive profits with respect to the application of the Renegotiation Act to the so-called Red Sea Space Charter Contracts of your corporation."

The "attached recommendation" was that the vessel owner be requested to refund to the United States $959,525.74, less tax credit, if any; that the company be afforded a period of two weeks within which to indicate its approval or disapproval thereof, with an opportunity to file written objections and that

> "Any agreement or order embodying a determination of excessive profit should be limited to the contracts here under review * * *. (See complaint in the above-entitled case.)

ment of the Board in the letter constituting the appendix to petitioners' brief, that it at no time understood the administrative orders by which its authority was derived, authorized it to do more than make recommendations to the Chairman (Petitioners' brief, page 68) is in direct conflict with statements in the Board's notice to *Luckenbach*, supra, that "This Board, however, will not hesitate *to issue a unilateral determination*," and that "* * * it looks as though we may reach a point very soon where we will have *to enter unilateral orders determining excessive profits* on the basis ~~of such figures~~ as we have." (Italics ours).

However, petitioners may not confer upon themselves jurisdiction which was not delegated to them by Congress, to make determinations with respect to contracts with a foreign government, even by resort to the device outlined in the Board's letter appended to petitioners' brief. The procedure outlined therein can lawfully relate only to contracts with a Department.

II.

The Existence of an Administrative Procedure for the Determination of Excessive Profits Which may be Realized Under Contracts with a "Department," Does Not Deprive the Courts of Jurisdiction to Restrain the Unauthorized Renegotiation of Contracts Between Respondent and a Foreign Government.

Petitioners, conceding that the charter parties in controversy are contracts between respondent and the British Government, nevertheless maintain that respondent is not entitled to the relief sought. Their contentions are supported by arguments which may be summarized as follows:

1. That the Renegotiation Act prescribes a procedure, administrative in character, for determining the amount of excessive profits realized under contracts with a Department as defined in the Renegotiation Act;

2. That authority to make such determination includes jurisdiction to determine that respondent's charters, the provisions of which show them to be with a foreign government, are contracts with a Department;

3. That notwithstanding the fact that the provisions of the contracts involved show them to be with a foreign government, if the Board, the Chairman, and the Tax Court determine that they are with a Department, that determination is final and may not be reviewed by any court. This, they assert, is because of the exclusive nature of the administrative remedy provided for determining the amount of excessive profits under contracts with a "Department."

4. Petitioners actually go further and say that if a member of the staff of the Board, speaking for himself and not for the Board, expresses a personal opinion that such charters are contracts with the Commission and are, therefore, subject to the provisions of the Renegotiation Act, and "requests" the submission of information, statements, and financial data in connection therewith, respondent has no standing in Court to obtain relief, but must submit to the renegotiation of such charters regardless of whether or not Congress has subjected them to renegotiation;

That argument refutes itself by making the administrative agent independent of the law which created it and by denying to the courts any preventive power whatsoever in the field of renegotiation. The argument asserts that whatever is done in the name of renegotiation must be free from judicial interference until after the renegotiation officials shall have accomplished their purpose, and that it is only then, if at all, that the respondent may have recourse to a court for a determination of the question of whether contracts with a foreign government were subject to the law in the first place.

Petitioners do not concede that even then would respondent be able to maintain a suit to recover the money which had been wrongfully taken from it. They assert that the provisions of the Renegotiation Act conferring exclusive jurisdiction to finally determine the amount, if any, of excessive profits and providing that such determination shall not be reviewed or redetermined by any other court or agency constitute, in effect, a withdrawal of the consent of the United States to be sued for the recovery of monies so illegally withheld.

The prevention of a multiplicity of unnecessary actions and the curbing of abuses of authority by Government bureau heads and administrative officers is one of the well-established bases for the intervention of equity. Whether the Tax Court is expert at profit questions and whether the judicial remedies available under the Renegotiation Act accord due process in the determination of excessive profits, are questions which do not have any bearing in a case such as the instant case, wherein the sole question is whether the Renegotiation Act is being violated by the officials appointed to enforce it.

Petitioners contend that if the issue presented in this case is decided on its merits by the Court, it makes available a means to war contractors of effectively halting renegotiation proceedings at the threshold for substantial periods of time (Petition for Certiorari p. 10) and would "as a practical matter play havoc with the statutory scheme for redetermination" (Petitioners' brief p. 38).

That argument, it is submitted, is sheer sophistry. It is not only wholly unfounded in law, but it is contrary to the facts.

There has been no delay in the renegotiation of respondent's contracts with any of the departments specified in the Renegotiation Act because of this suit.

The "statutory renegotiation proceedings" of such contracts have progressed at the pace set by the War Shipping Administration Price Adjustment Board to which such con-

tracts have been assigned for renegotiation.[13] Information and data called for by such Board have been filed and conferences have been held between respondent and that Board with respect to such renegotiation.

The rendition of a decision on the merits in this case will not interfere with the renegotiation task of the departments but will rather induce the departments to confine themselves to the task which Congress has appointed for them. It is a curious argument which seeks to justify the violation of a right by saying that if the illegal act is prevented by the Court, other persons would also seek judicial recourse against the violation of similar rights. That is what the equity courts are for—to prevent the doing of wrongs. In addition to the respondent, fifteen other steamship companies are being threatened by the petitioners with the same wrong which this Court is asked to enjoin. Can any man conscientiously state that the administrative processes of Government will be less clogged by sixteen companies pursuing the circuitous remedies recommended in the petitioners' brief than by permitting the instant case to be decided on its merits so that a precedent will be furnished for the issue which confronts all such companies?

To say, as the petitioners do, that this suit is one in which the Court is asked to interfere with the official discretion of government officers, entirely misconceives respondent's legal rights supporting its standing to maintain this action. To prevent a government officer from doing what he has no legal right to do, is not an interference with his discretion. *Ex parte Young*, 209 U. S. 123, 159. If such officer has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. *Noble* v. *Union River Logging R. Company*, 147 U. S. 165.

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[13] The War Shipping Administrator was, until his resignation January 15, 1946, the same individual as the Chairman of the Maritime Commission.

It is no answer to say that the administrative body may, upon consideration, determine that no excessive profits were realized. The respondent is entitled to come into Court, *not* to review action within the discretionary authority of the petitioners to render a favorable, rather than an adverse decision, but because of erroneous determinations of law completely outside the petitioners' authority. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 134.

Respondent relies upon the familiar principle that "there is no place in our Constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." *Garfield* v. *Goldsby*, 211 U. S. 249, 262.

The principles governing the use of injunctions against administrative officers were summarized in *Proctor and Gamble* v. *Coe*, 68 App. D. C. 246, 96 F. (2d) 518. (Cert. Denied 305 U. S. 604) That was an appeal from an order of the District Court dismissing a bill to enjoin the Commissioner of Patents from cancelling a trade mark until litigation in the Federal Court in New Jersey should be terminated. The Commissioner of Patents had held the trade marks should be cancelled pursuant to proceedings had in the Patent Office, and this decision had been affirmed by the United States Court of Customs and Patent Appeals. Subsequently, the District Court for New Jersey dismissed litigation by which it was sought to have Proctor and Gamble Company deliver up its trade mark to the Commissioner of Patents for cancellation on the ground that the decision of the Court of Customs and Patent Appeals made the question of cancellation *res judicata*. The Court said: (p. 249)

> "The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws: (1) *Where an officer*, insisting that he has the warrant of the statute, *is* transcending its bounds, and thus *unlawfully assuming to exercise the*

power of government (Philadelphia Co. v. Stimson, supra), (2) *where an officer attempts to enlarge his power, or to usurp power* (Waite v. Macy, supra); or (3) where his act is based upon a clear mistake of law (American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109, 110, 23 S. Ct. 33, 47 L. Ed. 90); (4) *where the action* of the officer or administrative body *is clearly beyond its power and in violation of the statute* (citations omitted); (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner (Commercial Solvents Corp. v. Mellon, 51 App. D. C. 146, 277 F. 548, 550, and cases there cited); (6) where the act of the officer, 'under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority (and) he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.'" (Citations omitted) (Italics ours.)

The Court has recently said in a case involving the Renegotiation Act, that where equitable relief is necessary to prevent a trespass against complainant's property by an administrative official, acting as an individual and not as an officer of the government, it will be granted. *Mine Safety Appliances Company* v. *Forrestal*, No. 71 this Term, decided December 10, 1945.

The petitioners endeavor to support their novel argument with the line of decisions of which *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, is typical. Those cases, however, are *not authority for petitioners'* contentions. The *Myers* case is one of a long line of decisions which have established the principle that where administrative officers are acting within the authority conferred by a valid statute, the complainant must first comply with the prescribed procedure before seeking relief in the courts. But the administrative procedure must be an adequate one. *Gilchrist* v. *Interborough Company*, 279 U. S. 159. The *Myers* case was a suit to enjoin the holding of a hearing

by the National Labor Relations Board upon a complaint which had been filed, charging a violation of the National Labor Relations Act. That Act vested the exclusive power in the Board and the Circuit Court of Appeals to prevent any person from engaging in an unfair practice affecting commerce. This grant of exclusive power was sustained because "the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, p. 48.

The Renegotiation Act provides no procedure except for the purpose of determining the amounts of excessive profits under contracts with a Department.

All that is necessary is for the Chairman, or those to whom he has delegated his authority, to form an opinion that the profits realized under a contract with the Commission are, or may be, excessive. He is then required to renegotiate, that is, refix the contract price, either by agreement or by unilateral action.

The statute in the *Myers* case granted the Board no power enforcing obedience to its subpoena to testify or produce written evidence.

The Renegotiation Act provides that the Secretary of each department may require the production of information and financial data with respect to any contracts to which the statute applies. Wilful failure to comply with such demands may result in criminal penalties.

Under the statute in the *Myers* case, the Board was without power to enforce its order. Application to a Circuit Court of Appeals was required, and only when sustained by it could the order be enforced.

Under the Renegotiation Act, the Chairman may withhold amounts which may be due to the complainant under contracts with the United States. The filing of a petition in the Tax Court for a redetermination of the amount of exces-

sive profits does not operate to stay the withholding of such amounts. (Pamphlet, p. 38)

The statute under consideration in the *Myers* case provided for a review by the Circuit Court of Appeals of findings of the Board. The Renegotiation Act provides that the final determination of the Tax Court of the amount, if any, of excessive profits "shall not be reviewed or redetermined by any court or agency."

It is obvious from this comparison that the principle decided in the *Myers* case is not applicable to the law or the facts in this case.

The other cases relied upon by petitioners are to the same effect.

Newport News Shipbuilding and Drydock Company v. *Schauffler*, 303 U. S. 54 involved, as did the *Myers* case, the National Labor Relations Act and was decided upon the same basis as the *Myers* case.

In *California* v. *Latimer*, 305 U. S. 255, the Board could not enforce its orders, except by resort to legal proceedings.

In *Power Commission* v. *Edison*, 304 U. S. 375, the Commission had to apply to the courts to enforce its orders for the production of books, etc.

In *Petroleum* v. *Commission*, 304 U. S. 209, the statute contained "detailed provisions for hearings and judicial review."

In *Natural Gas Pipeline Company* v. *Slattery*, 302 U. S. 300, the statute provided for an adequate administrative remedy which included a hearing. But this Court pointed out (p. 310) that if the Commission had refused to suspend the operation of penalties, resort to the Courts would have been justified.

In *Miles Laboratories* v. *Federal Trade Commission*, 140 F. 2d, 683 (App. D. C.) (Certiorari denied 322 U. S. 752) the orders of the Commission were, by the terms of the statute, subjected to court review.

In *Coffman* v. *Breeze*, 323 U. S. 316, the statute provided a remedy against the United States in the Court of Claims,

and what is more important, provided that this was the sole and exclusive remedy, while guaranteeing just compensation, and not such an amount as, in the opinion of executive officers, should be allowed.

Levers v. *Anderson*, No. 51 this term, decided November 5, 1945, involved a statute which by its terms provided for judicial review.

In the light of the foregoing decisions, the argument of petitioners in the Court below that the Court lacks jurisdiction to grant the relief sought is palpably untenable. It is perfectly clear that if the determinations and demands already made, exceed the authority conferred upon the Chairman by law, petitioners may be enjoined from carrying them into effect.[14]

III.

Failure to Pursue an Administrative Remedy is Not a Valid Ground for Denial of the Relief Sought by Respondent Because no Such Remedy is Available.

Petitioners argue that a comparison of the language of the Renegotiation Act with respect to the determination of excessive profits under contracts with a Department, with the language of the Internal Revenue Code relating to the redetermination of a tax deficiency, discloses the intention of Congress to confer jurisdiction on the Tax Court to make determinations with respect to contracts with foreign governments, which shall be final, and not subject to review by the Courts.

That contention, however, disregards the plain language of the Act and the legislative history thereof. The Renegotiation Act provides in Section 403(c)(2) that any contractor aggrieved by a determination of the Secretary *as*

[14] See *Bradley* v. *Richmond*, 227 U. S. 477, *First National Bank* v. *Weld County*, 264 U. S. 450, *Work* v. *Louisiana*, 269 U. S. 250, *Colorado* v. *Toll*, 268 U. S. 228, *Anniston Manufacturing Company* v. *Davis*, 301 U. S. 337, *Minnesota Ex Rel. Pearson* v. *Probate Court*, 309 U. S. 270.

to the existence of excessive profits, may file a petition with the Tax Court for a redetermination thereof. Upon the filing of such petition, the Tax Court "shall have exclusive jurisdiction, by order, to finally determine *the amount, if any, of such excessive profits* * * * and such determination shall not be reviewed or redetermined by any court or agency." (Italics ours.) The clarity of this provision was recognized by the Court in *Mine Safety Appliances Co.* v. *Forrestal, supra.*

The fact, however, that the Tax Court is given the power to make a final determination of excessive profits under contracts with a Department, does not justify the conclusion drawn by the petitioners that they, or the Tax Court, have jurisdiction to determine that contracts of a character not specified in the Renegotiation Act, are subject to the provisions thereof. As heretofore stated, the Congress determined that *only* those contracts which are with one of the Departments specified in the Act, are subject to renegotiation. Whether a contract is one with a Department, is to be determined by its provisions. The fact that one of the Departments, in this case the Maritime Commission, notified the holder of a contract with a foreign government that the payments required to be made under the contract would be paid by the Department out of lend-lease funds, pursuant to an arrangement between the United States and the foreign government, does not in any way alter the provisions of contract with respect to who are the parties to, and bound by, it. *Algoma Lumber Co.* v. *United States, supra.*

The determination of excessive profits which may be realized under contracts with a Department is a complicated procedure. The Act prescribes certain factors which must be taken into consideration in the determination of excessive profits. (Pamphlet, pp. 19, 20) These standards are necessarily general, for it is obvious that a dollar amount or value cannot be ascribed to any one factor. All the varied situations and circumstances which may arise with respect

to the efficiency of the operator, the reasonableness of costs and profits as related to volume of production, the amount and source of public and private capital employed and net worth, the extent of risk assumed, the character of the business, and such other factors which the consideration of the public interest and fair and equitable dealing may require, are all left to the determination of the Tax Court as to whether they are covered under a particular contract with a Department. The complexity of making the necessary determinations as to the extent to which these and many other factors shall be taken into account, was the very reason that the Congress selected the Tax Court, rather than some other agency, to make a final determination of the amount of excessive profits realized under contracts with a Department.[15]

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[15] The Committee on Ways and Means, of the House of Representatives, in its report upon the Revenue Bill of 1943 (Report No. 871, House of Representatives, 78th Congress, 1st Session) stated, with reference to the duties of the Tax Court (pp. 76-77):

> "Under existing law there is no right of appeal or review whereby the contractor may have the *question of his excessive profits* redetermined. * * *
>
> "Any contractor * * * who feels aggrieved by an order of the Board (a unilateral determination) *determining an amount of excessive profits* received or accrued by the contractor * * * within 90 days after the entry of such order or unilateral determination, may file a petition with The Tax Court of the United States for *a redetermination of such profits*. That court will have exclusive jurisdiction, by an order, to make a final determination *as to whether excessive profits have been received* or accrued, * * * and The Tax Court's determination may not be reviewed or redetermined by any other court or agency. * * *
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> * * * *
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> "* * * It is provided that the contractor * * * is to have the burden of going forward with the evidence, whether as to the existence of excessive profits or as to the amount thereof."
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> * * * *
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> "The Tax Court of the United States is peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose." (Italics ours)

Added support is given to this construction by the testimony of the Honorable Francis M. Shea, Assistant Attorney General, (who was on the brief as counsel for petitioners in the Court below) at the hearings before the Committee on Finance, United States Senate, on the bill H. R. 3687, 78th Congress, 1st Session, that (p. 1033)—

> "Obviously, in our judgment, if any large proportion of these contracts gets into court on the issue of *what is the reasonable profit that should be*, or should have been, *received under them*, no machinery of litigation can do the job. * * * If this job of renegotiation is to be done effectively and fairly, *the great bulk of it must be disposed of by administrative procedures* and not by litigation." (Italics ours.)

The exclusive remedy for the determination of the factual question as to the existence and the amount of excessive profits realized from contracts with a Department, does not confer upon the petitioners and the Tax Court the power, which they do not otherwise have, to make any determination with respect to respondent's contracts with the British Ministry.

An argument similar to that submitted by petitioners herein was rejected by the Court in *Stark et al.* v. *Wickard*, 321 U. S. 288, where the Secretary of Agriculture attempted to withhold certain sums owed to the plaintiffs from third parties under cover of the Agricultural Market Agreement Act of 1937, and the plaintiff sought to enjoin such act as being outside the authority conferred upon the Secretary by such Act. The Court stated (p. 309):

> "Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the

exercise of their general jurisdiction. *When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.* (Authorities) *This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyound the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.* Cf. *United States* v. *Morgan*, 307 U. S. 183, 190-191. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons *or by the exertion of unauthorized administrative power.* (Italics ours.)

"It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. * * * Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case. *Cf. Landis* v. *North American Co.*, 299 U. S. 248. Should some provisions of an order be held to exceed the statutory power of the Secretary, it is well within the power of a court of equity to so mold a decree as

> to preserve in the public interest the operation of the portion of the order which is not attacked pending amendment." [16]

The Act under consideration in that case provided an administrative remedy with respect to matters coming within the jurisdiction of the Secretary of Agriculture. Similarly, the Renegotiation Act provides an administrative remedy for the determination of excessive profits under contracts within the jurisdiction of petitioners. The statute in the *Stark* case required the Secretary to hold a hearing prior to the issuance of a marketing order. The Renegotiation Act requires no hearing, and none was held prior to the determinations complained of herein. In fact, monies of respondent may be withheld and covered into the Treasury of the United States prior to any hearing upon the question of whether excessive profits existed. There is no provision for any hearing at all on the question already determined by petitioners, that respondent's charters are contracts with the Commission.

The Court in the *Stark* case decided exactly what respondent is contending for here: That (p. 307)—

> "It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack on the inclusion in the Order of provisions entirely outside of the Secretary's delegated powers."

A similar conclusion was reached in *Lukens Steel Company* v. *Perkins*, 70 App. D. C. 354, 107 F. (2d), 627. The appellants there were not challenging the validity of the statute, but contended instead that appellees had acted and threatened to act in violation of the statute, and without authority of any kind. Appellees contended there, as petitioners are contending here, that the complaint should be

[16] See also *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *Philadelphia Company* v. *Stimson*, 223 U. S. 605, *Waite* v. *Macy*, 246 U. S. 606.

dismissed because, among other things, the appellees had not exhausted their administrative remedy, but the Court answered that contention in the following language:

> "But no administrative remedy is provided by the act to meet the grievances alleged in the complaint, and no administrative remedy is otherwise available. The act does not contemplate unlawful conduct beyond its terms and entirely outside the scope of its authority."

The Court went further and stated:

> "Section 6 assumes a proper determination *within the scope of the Act* and pursuant to the authority thereof. The procedure therein provided could not possibly be used to challenge the authority of appellees to act as they have done. Moreover, even if that procedure were available to appellants, *its use would admit the legality* of the protested determination and leave them at the mercy of appellees in carrying out their unlawful purposes."[17] (Italics ours)

This Court reversed the case (310 U. S. 113), on the ground that the complainants had not shown any injury or threat to a particular right of their own, as distinguished from a mere possible injury to the public, but indicated that the result might have been different if the contested action of the restrained officials had invaded private rights in a manner amounting to a tortious violation.

The cases of *Blair* v. *Oesterlein*, 275 U. S. 220, *Heiner* v. *Diamond Alkali Company*, 288 U. S. 502, and *Williamsport Company* v. *United States*, 277 U. S. 551, relied upon by petitioners, are not to the contrary. The principle decided in those cases has no application to the facts in this case. In the *Oesterlein* case, the court said that the question of whether or not two years considered together, instead of separately, by the Commissioner of Internal Revenue, in determining whether a deficiency existed, was not properly

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[17] To the same effect is *In Re Fassett*, 142 U. S. 479, discussed in respondent's brief in opposition, pp. 29-31.

before the Court because it had not been previously raised. In any event, the determinations of the Commissioner of Internal Revenue were subject to review by the Courts. If a determination of excessive profits had been made by the Commissioner under Sections 327 and 328 of the Internal Revenue Act of 1918 (40 Stat. 1057) with respect to a person not a taxpayer, a question analogous to the question here, the result in those cases would have been different.

There is no reason in law why the respondent should be required to furnish the information and data demanded of it unless the charter agreements are contracts with the Commission. That question is properly before this Court for determination and obviously cannot be determined in any statutory forum provided in the Renegotiation Act.

IV.

The Tax Court Procedure Under the Renegotiation Act Does Not Provide Respondent With an Adequate Remedy at Law, and None is Otherwise Available.

If the Congress had intended to confer upon the petitioners jurisdiction to require the renegotiation of such contracts as in their discretion they might determine should be renegotiated, it would have established standards for their guidance in making such determinations. Furthermore, it would have provided for a review by the courts of decisions of the Tax Court in the same manner as is provided for a review of the decisions of that Court with respect to a redetermination of tax deficiencies, in order to afford adequate opportunity to secure judicial protection against just such arbitrary and unlawful action as has occurred in this case.

Not only was no such provision included in the Act, but it is specifically provided that the determination of the Tax Court shall *not* be reviewed by any court or agency.

Petitioners have confused the power of the Tax Court—indeed, the necessity—to decide questions with respect to

coverage of certain factors which the Act requires to be taken into consideration in renegotiating contracts subject to it,[18] with jurisdiction of such Court to decide that a contract with a foreign government is a contract with the Commission, or to make any determination at all with respect to such contract. *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501, relied upon by petitioners, is not authority for their position in this regard.

In that case, the Court held that the Secretary of Labor had authority to make determinations as to whether a contract with the government for the supply of materials, covered certain plants and employees of the company, in reaching a conclusion as to whether the company was complying with the contract in paying the minimum wages specified therein, and limiting the hours of labor of its employees to the maximum specified in the law and the contract. The Court did not say that if the Secretary of Labor had determined that a contract between the company and a foreign government was subject to the provisions of the Walsh-Healy Act and had undertaken an investigation thereunder, and demanded the production of

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[18] The Ways and Means Committee, in reporting the Revenue Bill of 1943, called attention to some of the questions of "coverage" involved in arriving at the amount of excessive profits. The Committee stated (Report No. 871, supra, p. 81):

> "• • • Costs that are unreasonable or not properly chargeable to the contract or subcontract, in the opinion of the Board or of The Tax Court of the United States, as the case may be, are disallowed. Subject to these qualifications, items of the character allowed as deductions or exclusions in computing net income for income tax purposes are, with the exception of taxes measured by income, allowable to the extent that they are allocable to such contracts or subcontracts.
>
> "All items of the character allowed as deductions and exclusions for income and excess profits taxes (including the current amortization deduction), to the extent allocable to such contracts and subcontracts allowed as items of cost. Federal taxes are not allowable as items of cost. After the excessive profits have been determined, however, credit is allowed for any income and excess profits taxes paid with respect thereto."

payroll data and other information, that she would have had authority to do so. Such a holding would have been contrary to the decisions in the cases heretofore cited.

Whether the administrative procedure established for the determination of the amount of excessive profits under contracts which the Congress has determined should be renegotiated—that is, contracts with a department—is adequate to afford due process for that purpose, is not involved in this case.

The Department of Justice, through the Honorable Francis M. Shea, Assistant Attorney General, officially advised the Committee on Finance of the United States Senate that the provision for redetermination by the Tax Court did not provide procedural due process, even with respect to that question. In his testimony in the hearings upon the bill H. R. 3687, 78th Congress, 1st Session (Revenue Act of 1943), he stated with respect to the administrative provisions of this Act, which were then under consideration, that (p. 1037):

> "Provision for appeal to the Tax Court *very probably does not constitute an adequate remedy at law* which specifies whatever right there may be to judicial process. * * * I do not say that if this bill were properly drafted for the purpose Congress might not thereby constitute The Tax Court one of the lower Federal courts and invest it with powers which would make it a fit tribunal for the satisfaction, by its review, of these fundamental constitutional rights. *I do think that Congress would have to go further than it has in this bill to make it a judicial tribunal.*" [19] (Italics ours.)

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[19] Mr. Shea, in his testimony before the Senate Committee on Finance, further stated: (p. 1033)

> "* * * by attempting to stop short of court review and make the last hearing a trial *de novo* in The Tax Court, which is but a part of the executive branch of the Government, *they are guilty of depriving the contractors of procedural due process*, which entitles them to court review of any claimed deprivation of fundamental constitutional rights." (Italics ours.)

In view of Mr. Shea's official advice to the Congress, and the subsequent change in the bill eliminating the duty of the Tax Court to make written findings of fact, (discussed in Br. in Opp., p. 29) the only reasonable conclusion that can be reached is that the Congress did not intend that the petitioners or the Tax Court should do more than ascertain and determine the amount of excessive profits realized under contracts to which the provisions of the Renegotiation Act are applicable.

The administrative remedy thus provided, by its very terms is inadequate to afford due process with respect to the determinations of petitioners and demands made upon respondent regarding its contracts with the British Ministry. Therefore, in the most favorable aspect of petitioners' contentions, whether the respondent could ever obtain relief at law, is a matter of speculation. In no view can it be said that there exists a plain, certain, adequate and complete remedy at law, in the absence of which respondent is entitled to relief in equity. Such lack of an adequate remedy in the Tax Court procedure is not cured, as suggested by petitioners (footnote 31, brief pp. 48 and 49) by the appropriation of funds referred to in such footnote. Clearly that appropriation was made for the purpose of repaying amounts withheld by the Secretary of any Department or the Board, in excess of "any amount finally ad-

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And, (at p. 1042)—

"Mr. Shea. So far as I can see, Senator, the consequence is going to be three or four duplications of full administrative hearings, without any provision for court review, and the gist of what we want to propose is that *adequate remedy* is not a multiplication of procedure; *it is one good trial and one good appeal on the administrative side, and a hearing by a court of those issues which should properly be reviewed by a court.*

"Senator Clark. Where the administrative agency is the final determining agency, it doesn't make any difference how many there are; *it does not mean that he has had his day in court.*

"Mr. Shea. *That is right.*" (Italics ours.)

judged or determined" by the Tax Court to be excessive profits.

The principle that the remedy upon its face must be adequate to meet the requirement of due process, in order to deprive an equity court of jurisdiction before such remedy is exhausted, was recently reaffirmed by this Court in *Yakus* v. *United States*, 321 U. S. 414. In that case petitioners had not availed themselves of the procedure set up by the Emergency Price Control Act by which persons subject to the maximum price regulations might test its validity. It was contended by petitioners that the administrative procedure was inadequate, but this Court overruled that contention in view of the fact that—(p. 437)

> "The emergency court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, *and secure its full judicial review by the Emergency Court of Appeals and this Court.*" (Italics ours.)

And the Court stated, in line with previous decisions that—(p. 435)—

> "Only if we could say in advance of resort to the statutory procedure, *that it is incapable of according due process* to petitioners *could we conclude that they have shown any legal excuse for their failure to resort to it* or that their constitutional rights have been or will be infringed." (Italics ours.)

In the Renegotiation Act, there is no provision for any type of hearing until the injury sought to be prevented by this action has occurred. The subsequent hearing in the Tax Court is confined to an issue which is not present in this case. It is submitted in all earnestness, that under

such circumstances equity courts are not to be deprived of their jurisdiction to prevent the injuries complained of herein.

V.

A Proceeding Under the Declaratory Judgment Act is Appropriate for the Determination of the Rights of the Parties to a Controversy Even Though Another Remedy is Available.

It is fundamental that where rights are invaded as they have been here, or immediately threatened, Federal Courts may give relief by either traditional remedies or by declaratory judgment.[20]

Where a declaratory judgment will clarify and settle legal relations in issue and where it will terminate, and afford relief from uncertainty and controversy, it is an appropriate remedy.[21] And it is a remedy which may be granted without regard to the existence of a remedy elsewhere and even in the absence of alleging that "irreparable injury is threatened."[22]

There is here a controversy between parties who face each other in an adversary proceeding. The dispute is definite and concrete. Prior to the suit, the parties had taken adverse positions with respect to the questions in issue.

Respondent's legal and constitutional rights have been and are affected and brought into question by the conduct and threatened conduct of petitioners. The question of legality of the action of petitioners in determining to apply, and in applying the Renegotiation Act to the charter agreements entered into between the respondent and the British Government has arisen between the parties hereto; namely,

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[20] *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227.

[21] *Delno* v. *Market Street Railway Co.*, C. C. A. Cal. 1942, 124 F. (2d) 965.

[22] *Aetna Life Insurance Co.* v. *Haworth*, *supra*.

whether the Renegotiation Act confers upon petitioners authority to apply its provisions to said charter parties and to make the determinations heretofore made and to take further threatened action thereunder. This question is fundamental to all activity of the petitioners with respect to the renegotiation of such charter agreements. Respondent has persistently claimed that petitioners could not rightfully or lawfully determine that the charter agreement between the respondent and the British Government are contracts with the Maritime Commission and subject to the provisions of the Renegotiation Act; that they cannot rightfully or lawfully apply said Act to the charters or do any act or take any steps with respect thereto. Petitioners assert that they are legally authorized by the Renegotiation Act to apply said Act to such charters and have commenced renegotiation and made certain determinations with respect thereto. They have (1) definitely rejected respondent's claim that the charter agreements are not subject to the provisions of the Renegotiation Act; (2) have determined affirmatively that the charter agreements are contracts with the Commission, and (3) that a portion of the profits realized therefrom constitute excessive profits within the meaning of the Renegotiation Act. (R. 31, 32)

It is, of course, a well-settled principle of law that "where the Commission's order denies an exemption from the terms of the statute, as in the Intermountain Rate Cases (*United States* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 476), the road to the courts' jurisdiction seems to be clear. There is a constitutional 'case' or 'controversy,' *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties;" *Rochester Telephone Corp.* v. *United States, supra*, p. 132.

In the instant case, the contested determination that respondent's contracts with the British Ministry are contracts with the Commission and as such subject to the provisions of the Renegotiation Act, necessarily and immediately

carries direction of obedience to demands addressed to the respondent for the submission of information, statements and financial data under the provisions of Section 403(c) of the Renegotiation Act of 1942. (Pamphlet p. 4) By that fact is created a constitutional case or controversy within the scope of the Declaratory Judgment Act.

With respect to such charter agreements, petitioners plainly intend to perform what they consider their duty under the provisions of the Renegotiation Act and will, unless the Courts intervene, determine the portion of the profits resulting from the performance of such agreements, which, in their opinion, constitutes excessive profits within the meaning of the Renegotiation Act. They intend to and will withhold the amount, so determined by them, from sums due respondent on contracts with the United States.

A declaratory judgment in respect of whether the Congress has provided for the renegotiation of the charter agreements entered into between the respondent and the British Government would terminate the controversy between petitioners and respondent and remove all uncertainty between them with respect thereto, and would set said controversy at rest before it leads to a further invasion of respondent's rights. The renegotiation, when consummated by unilateral action of the petitioners, with consequent withholding of large amounts of respondent's monies now due or to become due on contracts which it holds with the United States, would give rise to much involved controversy and litigation, with claims and counter claims over a long period. It would result in a multiplicity of suits in various jurisdictions and put respondent to great expense and cause prejudicial uncertainty in respondent's financial position in respect to its shipping business. The respondent has no remedy or adequate means of relief against, or in avoidance of, the unlawful acts done and threatened, except by intervention of the Courts under the Declaratory Judgment Act or the traditional remedy of injunction.

This case, therefore, presents a controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the entering of a declaratory judgment.[23]

This proposition was recently upheld by the Court in *Spector Motor Service Inc.* v. *McLaughlin*, 323 U. S. 101, which was a suit brought in a United States District Court to enjoin the enforcement of a Connecticut State Tax and for a declaratory judgment that the statute did not apply to complainant.

The constitutionality of the statute had not been determined by the Courts of Connecticut with respect to the application of the statute to the business of petitioner. This Court held that a declaratory judgment proceeding was appropriate, stating:

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate * * * *because of the uncertainty surrounding the adequacy of the Connecticut remedy.*" (Italics ours)

The case, therefore, was remanded to the District Court with directions to retain the bill pending the determination of proceedings in the state court.

In *Perkins* v. *Elg*, 69 App. D. C. 175, 99 F. (2d) 408 (affirmed 307 U. S. 325), the Court sustained the action of the District Court in granting an injunction and a declaratory judgment as well. In that case the complainant had been born in this country, of naturalized parents and during her infancy taken back to her parents' native land of Sweden. Upon reaching her majority she returned to this country and was given a passport. Later it was found that her father had no intention of again becoming a permanent resident of this country and she was immediately declared

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[23] *Maryland Casualty Company* v. *Pacific Coal and Oil Company*, 312 U. S. 270; *Brillhart* v. *Excess Insurance Co. of America*, 316 U. S. 491; *Great Lakes Dredge and Dock Company* v. *Huffman*, 319 U. S. 293.

to be in the country illegally. She was threatened with arrest and deportation in the event she did not leave the country voluntarily. However, as a matter of grace the threatened action was held in abeyance, but the officials of the Labor and State Departments still maintained that her entry was illegal. She brought suit to enjoin the threatened action on the part of the officials and also for a declaratory judgment, declaring her status as a citizen of the United States. The contention was made there that she had a remedy at law by submitting to arrest and testing the question by a writ of habeas corpus. But the Court of Appeals said:

> "The trial court, as we have seen, concluded that the case was properly brought within the declaratory judgment statute. We are of the same opinion.
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> "* * * There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. * * * she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights,—certainly no less valuable than property rights,—and an actual and vital controversy exists between her and the government in relation to them."

The only difference in the *Ely* case and the case at bar is the kind of right involved. It is clear, therefore, that where an administrative agency is exceeding its statutory authority or where the remedy provided in the statute is inadequate, a declaratory judgment proceeding is proper.

VI.

Unless Respondent is Granted the Relief Sought, It Will Be Subjected to Multiplicity of Actions, and Exposed to the Danger That Sums of Money Which May be Withheld From it by Petitioners When Covered Into the Treasury, Will be Beyond Reach of Any Suit at Law.

It is well recognized that where a complainant may be subjected to the necessity of bringing numerous suits or defending numerous suits, that is sufficient to sustain the jurisdiction of an equity court. The nature of the contracts respondent has with various agencies of the United States, on account of which the petitioners might withhold or cause to be withheld, sums which they determine to be excessive profits realized under the charter agreements in question, are such that a multiplicity of suits in different jurisdictions would be necessary in an effort to recover the amounts so withheld. This assumes, of course, that the remedy would be available to respondent. It may be necessary for respondent to bring actions upon numerous contracts, some of which may be cognizable in the Court of Claims and others in the United States District Courts sitting in Admiralty. Respondent, therefore, will be subjected to the burden of a multiplicity of actions and be put under the burden of litigating with agencies of the United States Government which have no direct interest in this controversy. This alone is adequate to sustain equity jurisdiction.[24]

As the Court said in *Ex Parte Young, supra* (page 160):

> "It would be an injury to complainant to harrass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalities under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity."

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[24] *Wilson* v. *Illinois Southern Railway Co.*, 263 U. S. 574; *Union Pacific Railroad Co.* v. *Board of County Commissioners*, 247 U. S. 282; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393; *Ex Parte Young, supra.*

Moreover, were respondent remitted to numerous suits in order to recover amounts withheld by petitioners, the expense thereof would be such as to make the remedy elsewhere inadequate and the damage irreparable. Thus, in *Allen* v. *Regents*, 304 U. S. 439, the Court pointed out (p. 458)—

> • • • "And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity."

It is submitted, therefore, that respondent should not be turned to other proceedings where the remedy, if available at all, is inadequate and the expense thereof would be so great as to constitute irreparable injury.

Once the money which may be withheld by petitioners on account of contracts between respondent and the United States, is turned into the Treasury and mingled with the general funds, it is by no means clear that respondent could ever effect a recovery thereof. The Renegotiation Act provides, Sec. 403(c)(2):

> "All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts."

That the danger is real is manifest from the Court's decision in *Robinson, et al.* v. *Deal, et al.* (App. D. C.), 145 F. (2d) 382, (Cert. Denied, 324 U. S. 850) where the Court stated (p. 384):

> "The fact that the fund in the *Haskins Bros.* case was derived from the imposition of a tax, while here it was from the imposition by Act of Congress of a condition to the sale of cotton produced in excess of allotment, is of no consequence. The controlling principle

> is based upon the presence of the fund at the time of suit in the Treasury. The fact, found by the District Court, that 'there is no congressional authority for withdrawal of money from the Treasury under the pool appropriation account for payment to plaintiffs and intervenors,' leaves the courts without power to interfere."

Doubt alone concerning respondent's right to recover its funds, once they are covered into the Treasury, is sufficient to sustain the jurisdiction of an equity Court. The remedy elsewhere to defeat jurisdiction here, must be equally "certain and in other ways efficient." [25]

But more important, whether the respondent would be relegated to the Court of Claims or to the Admiralty Court in suits on its contracts with the United States to recover moneys withheld, it would be subjected to the additional hazard of complete loss of all its rights. This is because there can be no recovery against the United States for tortious acts of its officers. Thus, this Court has said[26] (p. 208):

> • • • "The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized. Acts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen." [27]

The Court said in the *North American Transportation and Trading Company* case that what an officer of the government had done without authority was tortious and created no liability on the part of the government.

Therefore, if the petitioners in this case, acting without authority of law, withhold or cause to be withheld from

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[25] *American Life Insurance Co.* v. *Stewart*, 300 U. S. 203.

[26] *United States* v. *Goltra*, 312 U. S. 203, 208.

[27] *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330; *Phelps* v. *United States*, 274 U. S. 341; *Hooe* v *United States*, 218 U. S. 322.

respondent moneys due it on contracts with the United States and consign the same to the Treasury, respondent may be completely barred from its recovery.

So long as petitioners have not actually seized respondent's property, an equity court—and only an equity court—can stay their hands. It can prevent the threatened unlawful action. The respondent should not be sent elsewhere, where once the mischief is done, there may be no remedy at all.

In the event petitioners should withhold moneys due respondent, it would lose not only the use of its money, but the interest thereon during at least a portion of time necessary to recover it. It could not in any forum, if the money be wrongfully withheld, recover interest during the whole time necessary to its recovery.[28]

The Act of March 3, 1911, c. 231 (36 Stat. 1141) as amended, 28 U. S. C. 284, expressly says:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *."

The Suits in Admiralty Act, c. 315 (47 Stat. 420), 46 U. S. C. Sec. 745, provides that

> "no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized hereunder."

The fact alone that in no action could respondent ever recover interest on the amount withheld from it, is ground for jurisdiction in equity. This is demonstrated by *Hopkins* v. *Southern California Telephone Co., supra.* Suit was brought by the Telephone Company to enjoin the county from seizing and selling certain telephone sets in satisfac-

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[28] *United States* v. *Goltra, supra; United States* v. *U. S. Fidelity & Guaranty Co.* (10 C. C. A., 1939), 106 F. (2d) 804, reversed on other grounds 309 U. S. 506; *Henkels* v. *Sutherland*, 271 U. S. 298.

tion of a tax which the company claimed was in conflict with the Federal Constitution. The Court pointed out:

> "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments."

The significance of respondent's inability to recover interest in any such actions as petitioners suggest (as bearing on the inadequacy of such other remedies) is apparent also from *California* v. *Latimer*, 305 U. S. 255. The amount involved was $7,862.32. There the Court was able to find that payment would not cause irreparable injury because:

> "the amount paid with interest could be recovered if not due."

Here that item never would be recoverable.

VII.

This is Not a Suit Against the United States.

Petitioners did not in their motion to dismiss raise the issue that this is an action against the United States; neither has it heretofore been urged in their briefs.

The argument which they now make has been rejected so frequently by this Court that it hardly deserves any reply. It is a well established principle of law that if the conduct of an administrative official constitutes interference with the rights of the complainant with respect to matters not within his statutory authority, resort to equity for protection is not a suit against the United States. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injur tive process on that ground.[29]

The *Mine Safety* case, *supra*, cited by petitioners does not modify that principle, but rather, reaffirms it. In that case,

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[29] *Philadelphia Company* v. *Stimson, supra; Waite* v. *Macy, supra; Stark* v. *Wickard, supra.*

the Secretary of the Navy had conducted renegotiation proceedings on contracts with a Department. He had made a unilateral determination of the amount of excessive profits, and by agreement with complainant, had suspended payment upon public vouchers otherwise payable by the Department to complainant, pending final determination of the suit.

The suit here is not one which would result in requiring the payment of any money by the United States to respondent. It is a suit to prevent petitioners from carrying out their unlawful determinations which threaten to deprive respondent of its legal right to retain the proceeds of its contracts with a foreign government, which contracts have not been subjected to the jurisdiction of petitioners for any purpose. A judgment for respondent herein would not, as suggested by petitioners, have "a substantial impact upon the financial affairs of the sovereign." (Petitioners' brief, p. 61) The sovereign has asserted no claim to the right to renegotiate respondent's charters with the British Ministry. On the contrary, it has through its law-making body specifically rejected the suggestion that such contracts be subjected to the provisions of the Renegotiation Act.

It is only the petitioners herein who have, despite such action by the sovereign, arbitrarily made determinations without any lawful authority, that respondent's charter parties are subject to the provisions of the Renegotiation Act, which, according to its terms, is applicable only to contracts with a Department specified therein.

Those determinations are not the determinations of the sovereign. They are the acts of the individuals.

Furthermore, "The Governments of the United States and the United Kingdom have reached an understanding for the settlement of lend-lease and reciprocal aid, * * * and for the final settlement of the financial claims of each Government against the other arising out of the conduct of the war * * * .

"This settlement for lend-lease and reciprocal aid will be complete and final." (*See Department of State Publication 2439, Commercial Policy Series 80, December, 1945, p. 4*)

The payment of the charter hire to respondent for the account of the British Ministry was made pursuant to an agreement between the two governments under lend-lease arrangements.

The conduct of the petitioners, therefore, can only be characterized as an illegal effort to recover from respondent the obligations of the British Government to the United States, which obligations have been settled by agreement between the two sovereigns.

That there is no basis for petitioners' contention that this is a suit against the United States is obvious from the facts and the cases heretofore cited.

CONCLUSION.

For the reasons stated herein, respondent prays that this Court determine that its charters with the British Ministry are not contracts with a Department within the meaning of the Renegotiation Act, and are not subject to the provisions thereof, and grant the relief sought in the complaint, and that the decree of the Court below be modified accordingly.

Respectfully submitted,

Bon Geaslin,
520 Investment Building,
Washington 5, D. C.
Attorney for Respondent.

January, 1946.

APPENDIX 1.

WAR SHIPPING ADMINISTRATION.

Price Adjustment Board,

New York, N. Y.

Attention of:

In reply refer to LPI-A No.
P. A. Paddock, Room 1002 — Budget Bureau No. 49-R183
39 Broadway, New York — Approval Expires 12/31/44

May 24, 1944

Waterman Steamship Corp.
Mobile, Alabama.

Gentlemen:

Price Adjustment Boards and Sections have been established for the conduct of statutory proceedings for the renegotiation of contracts and subcontracts. Renegotiation with respect to contractors whose fiscal years ended on or before June 30, 1943 is controlled by the Renegotiation Act of 1942 as amended by the retroactive provisions of the Renegotiation Act of 1943. Renegotiation with respect to fiscal years ended after June 30, 1943 is controlled by the Renegotiation Act of 1943. Copies of both Acts are enclosed herewith.

The matter of conducting your statutory renegotiation proceedings has been assigned to this office.

Unless the amount of your business during your latest complete fiscal year was less than the statutory minimum as defined by subsection (c) (6) of the Act applicable to your business for that year, you are required by law to furnish the information called for by the "Standard Form of Contractor's Report." On the basis of the information thus presented, a determination will be made as to whether or not further renegotiation proceedings will be necessary. (Steamship Companies please observe enclosed memorandum and be guided accordingly.)

To assist you in determining whether or not your business exceeded the statutory minimum as defined in the statutes

referred to, your attention is invited to the "Instructions for Preparation of Standard Form of Contractor's Report," which accompany this communicatic .

The enclosed "Standard Form of Contractor's Report" is requested pursuant to the statutory power to obtain information deemed necessary under the Act. Your filing of this "Standard Form of Contractor's Report" in satisfactory form will be deemed a compliance with the statutory provision requiring the filing by contractors and subcontractors of a financial statement under the first sentence of subsection (c) (5) (A) of the 1943 Act, if filed within the time prescribed in such Act.

The "Standard Form of Contractor's Report" is to be filed with the undersigned, in duplicate. If your concern reports on a fiscal year basis for federal income tax purposes, the report prepared should cover the same period.

If all of the information called for by this form has been furnished the Price Adjustment Agency to which the contractor has been assigned, refer to the final paragraph of the instructions.

A separate letter or statement, in duplicate, containing any comments which you believe pertinent with respect to statutory renegotiation as it affects you will be appreciated.

Should you need any information to aid you in the compilation of this material, in addition to that herein enclosed, you may call this office on the telephone. The number is Whitehall 3-8000, Extension 569.

Very truly yours,

/s/ JAMES L. MURPHY,
JAMES L. MURPHY,
Chairman.

Enclosures:

Standard Form of Contractor's Report (3)
Instructions for Preparation of
Standard Form of Contractor's Report
Pamphlet containing Renegotiation Acts
of 1942 and 1943.

APPENDIX 2.

The Shipping Act, 1916, as Amended.

Title 46 U. S. C.

"Sec. 808. *Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coastwise trade.*

* * * * * * *

"Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States."

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APPENDIX 3.

The Declaratory Judgment Act.

Title 28, U. S. C.

"Sec. 400. Declaratory judgments authorized; procedure

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

SUPREME COURT OF THE UNITED STATES.

No. 435.—October Term, 1945.

Edward Macauley et al., Petitioners, vs. Waterman Steamship Corporation. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The Renegotiation Act[1] authorizes the Chairman of the Maritime Commission under certain conditions prescribed by the Act to renegotiate war contracts made with the Commission for purposes of eliminating excessive profits. Respondent Waterman Steamship Corporation brought this suit against the Chairman of the Maritime Commission and the Maritime Commission Price Adjustment Board seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act and an injunction prohibiting further renegotiation proceedings involving these contracts. The complaint alleged the following facts here relevant: The Maritime Commission Price Adjustment Board notified Waterman that it had been assigned to renegotiate Waterman's contracts with the Commission and to determine the amount of excessive profits, if any, realized by Waterman. Waterman was requested to attend an initial conference and to supply information concerning these contracts which included certain Red Sea charters. Waterman in his reply to the Board denied its authority to renegotiate the Red Sea charters on the ground that these had been made with the British Ministry of War Transport and not with the Maritime Commission. The Price Adjustment Board in its answer to Waterman insisted that while the Red Sea charters were signed by the British Ministry for "technical reasons", they had been negotiated with Waterman by the Maritime Commission on behalf of the United States Government which was now responsible for paying the obligations incurred, and that they were therefore renegotiable

[1] 56 Stat. 226, 245; 56 Stat. 298, 982; 57 Stat. 347; 57 Stat. 569; 58 Stat. 21, 78.

contracts with the Commission.[2] Respondent refused to furnish the information requested and brought this suit in the District Court. That Court relying on *Myers* v. *Bethlehem Steel Corporation*, 303 U. S. 41, dismissed the complaint on the ground that Waterman had failed to exhaust the administrative remedies provided by Congress in the Renegotiation Act. The Court of Appeals reversed. 151 F. 2d 292. We granted certiorari because of the importance of the question involved.

The District Court properly held that this case should be dismissed on the authority of *Myers* v. *Bethlehem Steel Corporation*, 303 U. S. 41. In that case the employer sought to enjoin officials of the National Labor Relations Board from holding hearings on the ground that the business was not covered by the National Labor Relations Act. This Court held that the injunction could not be issued. It pointed out that the exclusive "power to prevent any person from engaging in any unfair practice affecting commerce . . . [had] . . . been vested by Congress in the Board." 303 U. S. at 48, and concluded that to grant the injunction would violate the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Under this rule the District Court here too lacked power to grant an injunction.

Just as in the *Myers* case, the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations

[2] Part of the Price Adjustment Board letter read as follows:

"On April 30, 1941 the President wrote the Chairman of the Maritime Commission and directed him 'as part of the defense effort to which this country is committed' to secure the service of at least 2,000,000 tons of merchant shipping. Pursuant to this direction, the Commission negotiated with the vessel owners. The vessels were made available, a charter party was signed with the British Ministry of War Transport for technical reasons but the commission agreed to pay the vessel owner the agreed compensation for the use of the vessel. This arrangement was evidenced by correspondence between the Commission and the vessel owner.

There appears to have been mutuality of understanding among all the parties interested, legality of consideration and definit'ness [sic] as to terms, time of performance and acceptance. Payment was made in due course as agreed and this payment constitutes a part of the cost of the war to the people of the United States."

in the first instance to determine whether excessive profits had been made on contracts with the Commission. A contractor aggrieved by the Chairman's determination of excessive profits may have them redetermined in a "de novo" proceeding before the Tax Court. Section 403(c)(1) of the Act provides that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ." Contrary to respondent's contention that this language limits the Tax Court's jurisdiction so as not to include the power to decide questions of coverage, we think the language shows that the Tax Court has such power. For a decision as to what are and are not negotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law,[3] which latter includes the issue raised here of whether the contracts in question are subject to the Act. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination. Here, just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act.[4]

Respondent urges several grounds for not applying the rule of the *Myers* case here. It points out that wilful failure to comply with the Adjustment Board's request for information would subject it to penalties under the Act; that the Chairman of the Commission and the Tax Court can enforce their orders without court enforcement proceedings; that the Act specifically provides that the Tax Court's determination is not subject to court review; and that even if respondent could, subsequent to a Tax Court de-

[3] One of the sponsors of the Renegotiation Act in the House explained the Bill as providing that the Tax Court could make decisions on all "questions of fact and law . . ." 90 Cong. Rec. 1355.

[4] The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment. Great Lakes Dredge & Dock Company *v.* Huffman, 319 U. S. 293, 299; Coffman *v.* Breeze Corporations, 323 U. S. 316; Alabama State Federation of Labor *v.* McAdory, — U. S. —; Brillhart *v.* Excess Ins. Co. of America, 316 U. S. 491, 494, 499.

termination, have resort to the courts, it would be subjected to a multiplicity of suits in order to recover the money due on the contracts. Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies. Its judgment dismissing the complaint was correct. The judgment of the Circuit Court of Appeals is

Reversed.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.